

The Movement Toward Early Case Handling in Courts and Private Dispute Resolution

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I. INTRODUCTION

Thomas Hobbes famously described human life as “nasty, brutish, and short.”¹ No doubt, many litigants would give the same description of litigation, except they see it as “nasty, brutish, and long.”² The perception of

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¹ THOMAS HOBBS, *LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* 82 (Michael Oakeshott ed., Basil Blackwell 1957) (1651). Hobbes used this phrase to describe the “state of nature” without government, which necessitated a “social contract [to] establish a civil society.” Wikipedia, Thomas Hobbes, <http://en.wikipedia.org/wiki/Hobbes#Leviathan> (last visited Feb. 23, 2009).

² David Margolick, *At the Bar: Does ‘Polite’ Really Mean ‘Wimpy’? Or, What Has Happened to Civility in a Once-Noble Profession?*, N.Y. TIMES, June 14, 1991, at B9 (“[court civility committee] could have just paraphrased Thomas Hobbes and said that lawyers are increasingly making the practice of law nasty, brutish and long.”); Jeff Kichaven, *Adding Value: Making the Strongest Case for Evaluation*, 19 ALTERNATIVES TO HIGH COST LITIG. 151, 169 (2001) (“Litigation promises to be nasty, brutish and long.”). Of course, litigation is a key element of a social contract that Hobbes called for to reduce the undesirable characteristics of the state of nature. And without litigation, life

repugnance is presumably related to a feeling that litigation goes on too long. If litigation was not so unpleasant, including distress about depletion of resources, the length might not be so problematic. Being in a dispute in an adversarial disputing culture is enough to bring out the brute in many people. Even though many parties and lawyers are not generally nasty, they may act that way in response to their perception of nastiness by the other side. This can lead to a cycle of escalating conflict, which prolongs the agony. The last thing that some people want to do in this situation is to work cooperatively with (what they perceive as) the brute on the other side. If parties have not already resolved a dispute by the time that they consult lawyers or begin litigation, they are likely to feel distrustful, angry, or afraid, and to be skeptical that they can negotiate successfully with the other side.³ Although it is well known that the vast majority of cases settle without trial,⁴ parties may not feel ready to settle, or even work together, right away. Some lawyers assume that their clients would prefer to strongly assert their positions and would lose confidence in them if they appear weak or uncertain.⁵ Since litigation is often seen as the normal way for lawyers to handle disputes, both lawyers and clients in a given case may simply assume that they should handle it as "litigation-as-usual."⁶ Moreover, lawyers have an economic

would probably be worse. Even so, many people undoubtedly experience litigation as a nightmare.

³ Anthropologists Sally Engle Merry and Susan Silbey interviewed citizens of a New England town and found:

[C]itizens do not use [ADR mechanisms] voluntarily to the extent hoped for by proponents of [ADR mechanisms] because by the time a conflict is serious enough to warrant an outsider's intervention, disputants do not want what alternatives have to offer. At this point, the grievant wants vindication, protection of his or her rights (as he or she perceives them), an advocate to help in the battle, or a third party who will uncover the "truth" and declare the other party wrong.

Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984).

⁴ See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (documenting general decline in trial rates).

⁵ See J. Brad Reich, *Attorney v. Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation*, 26 S. ILL. U. L.J. 183, 219 (2002).

⁶ "Litigation-as-usual" is not what it used to be, considering that there has been a trend for courts to closely manage the process and restrict lawyers' discretion to use the full range of possible litigation tactics. See *infra* Part II.A. More than just a set of behaviors, "litigation-as-usual" is also a mindset, which Professor Leonard Riskin described as the "lawyer's standard philosophical map." Leonard L. Riskin, *Mediation*

incentive to extend litigation.⁷ Certainly some clients seek negotiation, being wary of the costs and risks of litigation, and some lawyers suggest early resolution, believing it to be in the clients' interests. Nevertheless, it is often hard for clients and lawyers to escape the combination of seemingly-gravitational forces pulling them toward adversarial litigation. A major challenge for the courts and the alternative dispute resolution (ADR) movement has been how to help parties and lawyers escape the pull of nasty, brutish, and long litigation.

A disparate set of people and programs are part of a movement that they probably do not recognize⁸—a movement by both courts and private parties to handle civil cases⁹ as early as possible. The key element of early case

and Lawyers, 43 OHIO ST. L.J. 29, 43 (1982) (describing an orientation that assumes disputants necessarily are adversaries and disputes should be resolved following general rules of law). Under this mindset, lawyers begin by litigating vigorously and delaying negotiation until late in the litigation as part of a strategy to protect their clients' interests and gain adversarial advantage. See John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 214–15 (2008) (distinguishing mindset of “litigation-oriented” and cooperative lawyers); Julie Macfarlane, *The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law*, 2008 J. DISP. RESOL. 61, 65–66 (2008) (suggesting that while the traditional model of advocacy focuses on a litigation-centered approach, lawyers are using a new “conflict resolution advocacy” with increased focus on dispute resolution outside the legal system).

⁷ Lawyer William Coyne argued “that lawyers are working in a system that provides little incentive to settle cases and many incentives not to do so.” William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 376 (1999). He stated that lawyers have many understandable reasons for not aggressively promoting early settlement, including maintenance of a reputation for toughness; satisfaction of client expectations; pressure from client optimism; uncertainty about the law; practice culture promoting litigation; enjoyment of litigation; financial rewards; and a desire to achieve just results in court. *Id.* at 387–90. See also Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 11–13 (1998) (describing incentives and professional culture causing lawyers to spend substantial time and money in litigation).

⁸ When people think about movements, such as the civil rights movement or the environmental movement, these movements are generally recognizable by participants as well as outsiders. In particular, members of movements typically self-identify as belonging to those movements. By contrast, probably no one would recognize the broad early case handling “movement” described in this article (as distinct from the overall ADR movement), including people who are part of the movement.

⁹ For the purpose of this article, a “case” involves a civil claim that is or could be filed in court and that a lawyer or organizational party seeks to address. Since many such cases are resolved without any party filing an action in court, these cases are not synonymous with court cases, which constitute a much smaller population of disputes.

handling (ECH)¹⁰ is that people intentionally exercise responsibility for handling the case from the outset as opposed to passively allowing the case to run its course, often out of inertia or habit.¹¹ Beyond this general principle, there are many variations within this set of processes, which may focus primarily on analyzing cases (such as private early case assessment protocols), managing cases (such as pretrial conferences and case management systems), or ultimately resolving cases (such as early neutral evaluation (ENE),¹² settlement counsel, and Collaborative and Cooperative Practice¹³).¹⁴ These are concentric functions, at least theoretically,

¹⁰ For convenience, this article uses the term “early case handling” as if “it” is a single, uniform phenomenon, though “it” is really a collection of diverse processes, each of which has variations and whose effects vary based on numerous factors in addition to the processes themselves. Thus, one should avoid thinking about them as single, homogenous processes. See *infra* note 298.

¹¹ Professor Craig McEwen observed that in handling disputes, “frequently lawyers and their clients are trapped by the routines, incentives, and traditional expectations of legal and business practice.” McEwen, *supra* note 7, at 26. Similarly, researchers Roselle Wissler and Bob Dauber note, “[l]awyers’ negotiation practices seemed to reflect inertia and the repetition of habitual patterns rather than planning and active management.” Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR “Confer and Report” Rule*, 26 JUST. SYS. J. 253, 268 (2005) (citing several studies supporting this observation). This is also probably generally true of lawyers’ overall approach to litigation. Scholars Maurits Barendrecht and Berend R. de Vries reach a similar conclusion, arguing that parties use litigation—a “sticky default” process—more than they actually prefer because of problems in choosing alternatives. Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 93–111 (2005).

¹² There are different approaches to ENE, with some focusing primarily on producing resolution and others focusing primarily on managing cases. In practice, there is often some combination. See *infra* Part II.C.

¹³ Collaborative and Cooperative Practice are processes in which the parties and lawyers sign participation agreements establishing negotiation procedures. In Collaborative Practice, unlike Cooperative Practice, the participation agreement includes a disqualification provision precluding Collaborative lawyers from representing the parties in contested litigation, if needed. For further discussion of these processes, see *infra* Parts III.D, III.E. This article follows a convention of capitalizing “Collaborative” and “Cooperative” practice when referring to specific processes as distinct from when the words are used as generic adjectives.

¹⁴ It is useful to distinguish early case handling from other phenomena. Clearly, it is not traditional litigation and trial. Similarly, it is not “litigation-as-usual,” where participants use litigation and the threat of trial to play a game of “chicken” by holding out as long as possible to gain an adversarial advantage in negotiation. See Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984) (coining the term “litigation” to mean “the strategic pursuit of a

considering that managing cases inevitably requires some analysis, and resolution involves both analysis and management. These processes are generally done early in a case, though they may be used later in the process in some cases. Some of the same or similar processes (such as early mediation or ENE) may be used in court-connected or privately initiated processes. In court-managed processes, courts or individual judges can unilaterally decide to establish a process and require parties and lawyers¹⁵ to participate. In private processes, the participants take the initiative to use the process, sometimes unilaterally and sometimes by agreement of the parties.

This article is intended to (1) identify ECH as an important general phenomenon in dispute system design (DSD) theory¹⁶ and practice, (2) catalog the major ECH processes, and (3) urge practitioners and policymakers to encourage use of and experimentation with ECH processes when appropriate.

ECH processes offer many potential benefits for parties, lawyers, courts, and society. The sooner that participants focus on cases seriously, the sooner

settlement through mobilizing the court process"). Nor does it encompass all ADR processes. For example, mediation often occurs late in litigation. See Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 838-47 (1998) (analyzing why parties sometimes do not use mediation early in litigation). Obviously, this is not ECH. On the other hand, ECH is not conflict prevention, where one or more parties take the initiative to solve problems before the problems become transformed into "cases" (or "disputes" in the "Naming, Blaming, Claiming" framework). See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 633 (1980-81) (developing a framework for defining disputes as problems or "perceived injurious experiences," where one person blames another, and makes a demand that is rejected in whole or in part). Thus, ECH occupies the middle of the conflict-time continuum: after problems have crystallized into disputes and before they end up on the "litigation-as-usual" track.

¹⁵ For convenience, this article sometimes refers only to "parties," recognizing that their lawyers often act in their place. In addition, this article refers to cases as if they have only two parties. The same principles would apply in cases with more than two parties.

¹⁶ Some DSD theorists suggest that intentionally handling disputes early is an important element, though this is not an explicit or major element of some theories. See generally John P. Conbere, *Theory Building for Conflict Management System Design*, 19 CONFLICT RESOL. Q. 215 (2001) (summarizing the major authorities on DSD theory). DSD involves systematically managing a series of disputes rather than individual disputes. In general, it may include assessment of stakeholders' needs (especially disputants' needs); development of a system to address those needs; provision of necessary training and education; implementation; evaluation; and periodic modification. See *id.* at 217-30. DSD theories have focused on designing systems that provide disputants with multiple dispute resolution options, especially interest-based processes that are easily accessible, efficient, and fair. See *id.*

that at least some cases will get resolved. Reducing the length of a case is likely to reduce direct costs to the parties and courts, unless the process involves substantially greater effort than would have been used if the process proceeded at a slower pace.¹⁷ Earlier resolution offers the potential of efficiency resulting from conscious efforts to streamline the process to focus only on the critical aspects of the dispute, reducing unproductive efforts such as excessive and unfocused discovery. This is particularly likely to occur when opposing sides use the opportunity to seriously cooperate in managing the case. Similarly, earlier resolution should generally reduce indirect costs of prolonged disputing, such as opportunity costs of resources that would otherwise be devoted to the case, and continuing damage to relationships and reputations.¹⁸ If done properly, ECH has the potential to affirmatively create benefits. For example, a defendant may better satisfy plaintiffs by demonstrating an earnest effort to handle cases as soon as the defendant becomes aware of a problem.¹⁹ Indeed, this is the perspective of some enlightened manufacturers, health care organizations, insurers, and other organizations that have a regular flow of claims with customers, patients, and claimants, and that want to operate in accordance with their values and maintain good relationships and reputations for reasonableness.²⁰

Of course, using an ECH process is no guarantee of early resolution or improved outcomes. Even when using such processes, some parties may maintain sincere differences about important issues that justify extensive litigation. Moreover, some parties may simply go through the motions of an ECH process without participating sincerely.

In theory, there should generally be few or no disadvantages to ECH, at least when used well and in appropriate cases. Obviously, ECH processes may not be appropriate in some situations. For example, in some cases, if the amount at stake is small, using ECH would not justify the expenditure of

¹⁷ Christopher Honeyman, riffing on a quote in a college guide claiming that students can pick two out of three options between work, friends, and sleep, suggests that mediation on a “‘mass’ basis” cannot be good, fast, and cheap. Christopher Honeyman, *Two out of Three*, 11 NEGOT. J. 5, 5 (1995). Rather, parties and society can generally get two of the three benefits—quality, speed, and low cost—but cannot consistently get all three together. See *id.* at 5–6.

¹⁸ Professor Craig McEwen observed that efficiency in business disputing “appear[s] to be tightly interwoven with issues of quality.” McEwen, *supra* note 7, at 4.

¹⁹ See, e.g., Dale C. Hetzler, *Superordinate Claims Management: Resolution Focus from Day One*, 21 GA. ST. U. L. REV. 891, 894–96 (2005) (describing hospital’s use of litigation manager to build trust with claimants by providing early answers to their questions).

²⁰ See *infra* Part III.C (describing use of early case assessment and dispute resolution protocols to enable early intervention in disputes).

substantial resources. ECH also could be premature, for example, if a party is not emotionally ready to work constructively on a case. ECH could be problematic for some lawyers, especially those paid on an hourly basis, because using ECH could cause them to “lose” substantial revenue when cases are not handled as litigation-as-usual.²¹ Undoubtedly, many lawyers and law firms sincerely engage in some form of ECH, at least informally, as a matter of professional duty and/or enlightened self-interest in maintaining good client relationships.²² Nonetheless, lawyers and law firms are likely to “lose” substantial billings if they conscientiously use ECH in major cases. It must be hard for many lawyers to be indifferent to these economic realities, which may lead them to avoid using ECH.

ECH processes have been studied empirically and, not surprisingly, this article shows that the results are mixed and do not show that ECH is a “silver bullet” of dispute system design.²³ Although it would be nice if empirical research would yield strong and consistent findings that these processes are significantly superior to alternatives under all circumstances, it would be unrealistic to expect such results. Policymakers and practitioners should not wait for robust research findings showing that a particular process consistently “works.” That standard of proof is too high because dispute resolution phenomena are inherently variable. Using such a high standard could inhibit innovation. Instead, readers should consider research results to

²¹ Presumably, many lawyers would experience a “loss” of revenue generated from a case resolved through ECH as reflecting an expectation—or perhaps even a sense of entitlement—of receiving greater revenue if the case would be resolved through traditional litigation. Under the ethical rules, lawyers are not entitled to receive “unreasonable” fees. *See* MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2008) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”). Even so, where there is a norm of engaging in substantial and expensive litigation, it is probably hard for many lawyers to contemplate offering services that would regularly result in substantially lower fees. This may be particularly true in some law firms, where career advancement may be affected by the amount of revenue generated or where there are expectations to generate income for others in the firm. Lawyers who use systems other than hourly billing may be more comfortable using early case handling procedures. *See generally* MARK A. ROBERTSON & JAMES A. CALLOWAY, *WINNING ALTERNATIVES TO THE BILLABLE HOUR: STRATEGIES THAT WORK* (Richard C. Reed ed., Law Practice Management Section 3d ed. 2008) (discussing viable alternatives to hourly billing).

²² Similarly, some businesses routinely manage cases early, though McEwen found that one business in his study considered planning for early settlement to be the “biggest idea to come out of [a] consultant’s report,” reflecting the fact that it was not a standard practice. McEwen, *supra* note 7, at 9.

²³ *See infra* Parts II and III.

analyze what factors are likely to affect whether people achieve desired results with particular processes.²⁴

This article provides an overview of early case handling in the U.S. It includes illustrations of ECH practices, but does not attempt to provide a comprehensive analysis of any of them. Additionally, it may omit some manifestations of ECH. This article suggests that there is a trend of increased use of these seemingly unconnected practices,²⁵ though this article does not suggest that ECH necessarily should be, or ever will be, used in most cases. Part II discusses ECH in courts, including early case management procedures, differentiated case management systems, early neutral evaluation, and other early ADR processes. Part III reviews ECH in private sector dispute resolution, including ADR pledges and contract clauses; early case assessment and ADR screening protocols; settlement counsel; Collaborative Practice; and Cooperative Practice.²⁶ Part IV concludes by arguing that rules and orders by courts and other authorities regarding ECH processes may be helpful or even necessary, but are not sufficient to make ECH systems work. To develop an effective ECH system, leaders should recognize that these processes are not uniform “off-the-shelf” products that can simply be “plugged into” their operations on the assumption that people will simply follow directions to use them. Instead, system designers need to assess the motivations of the system participants and tailor the processes so that the participants will be motivated to use them effectively. Crafting flexible protocols for assessing appropriateness of ECH processes and tailoring them for particular cases and dispute systems is important for this effort. Prescribing such specific protocols is beyond the scope of this article, however.

II. EARLY CASE HANDLING IN COURTS

A. *Early Case Management*

Courts’ rules and contemporary legal culture enable courts to closely manage civil litigation from the outset, requiring parties to perform a wide range of activities to plan and conduct litigation. Indeed, the Federal Rules of

²⁴ For further discussion of appropriate interpretation of research findings, see *infra* notes 294–99 and accompanying text.

²⁵ This is consistent with Macfarlane’s analysis. See Macfarlane, *supra* note 6, at 62–63, 69–74.

²⁶ ENE and other ADR processes are used early in privately-arranged processes but are not discussed in Part III because the dynamics of these procedures are similar to those in court-managed processes described *infra* in Part II.

Civil Procedure prescribe detailed requirements to manage litigation from the beginning of a case, including certain conversations (a) between the parties and (b) between the parties and the court.²⁷ The initial planning is geared to the development of scheduling orders, and the rules establish a schedule of events that must occur before the issuance of these orders. Under Rule 16(b), judges “must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.”²⁸ Rule 26(f)(1) requires parties in most cases to “confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).”²⁹ At the parties’ Rule 26 conferences, they must discuss the legal issues, arrange for mandatory disclosures of information, develop a proposed discovery plan, and consider possibilities for settlement.³⁰ Within 14 days after the conference, the parties

²⁷ In this part of the article, the rules cited are the Federal Rules of Civil Procedure. For brevity, this part of the article focuses on case management in federal courts. Many state courts use similar practices. See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 621–23 (1998) (summarizing empirical research on discovery reform efforts in federal and state courts). See generally DAVID C. STEELMAN, NAT’L CTR. STATE CTS., IMPROVING CASEFLOW MANAGEMENT: A BRIEF GUIDE (2008), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1022> (National Center for State Courts’ guide describing case management processes in state courts).

²⁸ FED. R. CIV. P. 16(b)(2). Rule 16 was first adopted in 1937 and has been revised over the years. The 1983 revision added the requirement for a scheduling order. See FED. R. CIV. P. 16 advisory committee’s note.

²⁹ FED. R. CIV. P. 26(f)(1). This is sometimes referred to as the “meet and confer” requirement. See COMM. ON COURT ADMIN. & CASE MGMT., JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 8 (2001), available at http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgenal?openpage&url_r=/public/home.nsf/pages/814 (follow “text of the manual” hyperlink). Rule 26(f) was first adopted in 1980 and has been refined several times since then. In 1993, it was amended to require lawyers to develop discovery plans unless exempted by local rule. See FED. R. CIV. P. 26 advisory committee’s note. In 2000, this requirement became mandatory nationwide due to the repeal of courts’ authority to adopt local rules “opting out” of the requirement. See *id.*

Professor Michael Moffitt made a constructive proposal to require potential litigants to confer *before* filing pleadings, not just afterward. Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 749–56 (2005). He argued that under current practice, pleadings define disputes in adversarial terms that reduce the prospects for productive negotiations and suggests that requiring pre-pleading conferences would reduce problems caused by the adversarial dynamics of pleadings. *Id.* at 737–49, 770–71.

³⁰ FED. R. CIV. P. 26(f)(2).

must submit a joint discovery plan to the court.³¹ Before issuing scheduling orders, judges must receive the parties' discovery plan and consult with the parties' attorneys.³² Scheduling orders must set time limits for joinder of parties, amendment of pleadings, completion of discovery, and filing of motions.³³ These orders may include any "other appropriate matters," including, but not limited to, scheduling of required disclosures, discovery, pretrial conferences, and trial.³⁴ Rule 16 permits courts to schedule pretrial conferences throughout a case to manage the litigation;³⁵ identifies fifteen specific types of issues for consideration and possible orders;³⁶ and includes a catch-all provision authorizing courts to "facilitat[e] in other ways the just, speedy, and inexpensive disposition of the action."³⁷

The Judicial Conference of the United States, the policymaking body for the administration of the federal courts, promotes a legal culture that encourages judges to actively manage litigation as early and as much as necessary. The Judicial Conference published a *Civil Litigation Management Manual* that begins by describing early case management in federal district courts and extolling its virtues.³⁸

Establishing early control over the pretrial process is pivotal in controlling litigation cost and delay. Early control includes effective use of rules, procedures, and discretionary authority that cumulatively establish your role in the progress and conclusion of the case before you. It is very

³¹ *Id.*

³² FED. R. CIV. P. 16(b)(1).

³³ FED. R. CIV. P. 16(b)(3)(A).

³⁴ FED. R. CIV. P. 16(b)(3)(B).

³⁵ FED. R. CIV. P. 16(a). Rule 16(a) states that:

In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.

FED. R. CIV. P. 16(a). These conferences are sometimes referred to as "status" conferences. *See, e.g.,* Thomas J. Hurney, Jr. & Rob J. Aliff, *Medical Professional Liability in West Virginia*, 105 W. VA. L. REV. 369, 396 (2003).

³⁶ *See* FED. R. CIV. P. 16(c)(2)(A)–(O).

³⁷ FED. R. CIV. P. 16(c)(2)(P).

³⁸ COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 29, at 5.

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important to view this as a continuing process that includes an ongoing interplay between prefilings instructions, counsel actions, counsel meetings, and case management plans, extending from filing to disposition in every case. It would be hard to overestimate the importance of your investments of time and thought into how you will use the case management tools central to the exercise of your authority. Your discretionary tailoring of these tools to each case and your maintenance of consistency in applying them will help ensure your success as a judge.³⁹

The manual continues by emphasizing the importance of the earliest possible assumption of control:

How early is “early,” and how much control is necessary?

. . . .

This intervention cannot occur too soon; the process of federal case management, and the role accorded the assigned judge in its administration, argue for the *earliest* exercise of control and oversight to ensure that case resolution comes at the soonest, most efficacious, and least costly moment in every case.⁴⁰

The manual recommends that judges regularly conduct early screening of cases based on the pleadings and other filed documents to “provide an early warning of potential case management problems,” even before developing a scheduling order.⁴¹ The manual notes that judges differ about whether to hold pretrial conferences in every case.⁴² Judges who favor conferences in every case believe that such conferences can achieve multiple goals and save time in the long run.⁴³ Those who believe in using conferences selectively worry about wasting resources, especially in routine cases.⁴⁴ The manual does not express an opinion on this issue but advises judges to hold conferences when they would help achieve specific goals.⁴⁵

Wissler and Dauber reviewed empirical research on courts’ case management efforts and found mixed results for different types of efforts. They summarized the findings as follows:

³⁹ *Id.* (footnote omitted).

⁴⁰ *Id.* (emphasis in original).

⁴¹ *Id.* at 7.

⁴² *See id.* at 13.

⁴³ *Id.*

⁴⁴ COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 29, at 13.

⁴⁵ *Id.*

Several studies found that the early and active court management of the pretrial process, especially the early and firm scheduling of case events and trial, played a major role in reducing time to disposition without increasing judge time spent on cases. In addition, ongoing court control, requiring a discovery plan, and setting a discovery cutoff date reduced case disposition times. Pretrial conferences alone, when not accompanied by these other case management techniques, however, did not reduce the time to disposition.⁴⁶

They argued that an early conference with a judge or neutral third party might facilitate early resolution of cases for several reasons, including: reduction of participants' perceptions of weakness because they are required to attend by the court; receipt of information about ADR processes; reduction of partisan psychology; prevention or reduction of conflict escalation; and creation of a mandatory event that overcomes logistical barriers to negotiation.⁴⁷ They summarized research findings about the optimal timing of early conferences, which provided a mixed assessment about how early is too early—or too late. This may vary by local practice and culture and there may not be a uniformly optimal time to begin.⁴⁸ They concluded that the research suggests:

[I]f the primary goal is to achieve early settlement . . . , courts might want to consider, instead of a "confer and report" requirement [merely requiring lawyers to meet to discuss ADR], an early pretrial conference to discuss settlement and ADR, as well as the scheduling of case events and a discovery management plan. The conference might help initiate settlement negotiations or ADR use earlier, the scheduling of case events and discovery might help keep the process moving, and the use of ADR might assist the parties in settling.⁴⁹

They also reported some findings suggesting that an early conference may delay some cases, such as those that would not be contested or otherwise would be resolved early.⁵⁰ Moreover, one study found that early case management, such as holding status conferences or requiring parties to submit a case management plan, actually increased the number of hours

⁴⁶ Wissler & Dauber, *supra* note 11, at 269 (citations omitted).

⁴⁷ *See id.* at 267–68.

⁴⁸ *Id.* at 268–69.

⁴⁹ *Id.* at 270.

⁵⁰ *Id.* at 269.

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worked by lawyers and cost to litigants unless it was accompanied by a shortened period for conducting discovery.⁵¹

Although much of the research focuses on the impact of early case management in reducing the amount of time to resolve cases and related litigation costs, it has other potential benefits that should not be overlooked.⁵² These include the potential for increased cooperation between lawyers and parties, increased and strategic focus on the most critical issues in the conflict, reduction in unproductive conflict, and improvement of relationships.⁵³

In analyzing research on early case management and all other disputing processes, it is important to note the actual behavior in implementing such programs, and particularly whether people are following the prescribed program. For example, Wissler and Dauber conducted a study of a rule requiring Arizona lawyers to “confer and report” early in a case about the possible use of ADR.⁵⁴ They found that this rule did not increase early discussions of ADR or actual settlement.⁵⁵ The failure to achieve the desired results should not be surprising, considering that many lawyers did not comply with the rule and the courts did not enforce it.⁵⁶ In one of the two counties in the study, the court did not monitor the requirement at all.⁵⁷ In the other county, when lawyers did not comply with the rule, judges initially issued minute entries threatening sanctions, but the court apparently did not systematically review the statements or actually sanction lawyers.⁵⁸ Thus, readers should conclude from this experience that a “confer and report” rule may not work *if* the lawyers generally do not comply, which is presumably related to court support and enforcement of the rule. Such rules might work well if lawyers feel that the rule generally makes sense for their cases, the

⁵¹ See JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 54–57 (1996), *available at* http://www.rand.org/pubs/monograph_reports/2007/MR802.pdf.

⁵² See generally Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55 (2004) (summarizing empirical research on court-connected mediation and early neutral evaluation).

⁵³ *Id.* at 80–82.

⁵⁴ See Wissler & Dauber, *supra* note 11.

⁵⁵ *Id.* at 258–61.

⁵⁶ *Id.* at 254–55, 257.

⁵⁷ *Id.* at 254.

⁵⁸ *Id.* at 256–61. See also Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 478 (2004) (summarizing several studies showing substantial degree of lawyers' non-compliance with rules requiring them to advise clients about ADR or consult with opposing counsel).

courts generally support and enforce them, and compliance becomes part of the normal legal culture.⁵⁹

B. Differentiated Case Management Systems

In addition to establishing processes for managing individual cases described in the preceding part, some courts use systems to screen virtually all of their caseload soon after cases are filed and to designate them as fitting into certain categories (or “tracks”).⁶⁰ This is often referred to as differentiated (or differential) case management (DCM).⁶¹ A DCM system establishes different categories of cases, each of which requires different types or amounts of attention from the court. Tracks are defined by criteria such as anticipated complexity of cases, amount of discovery needed, time before trial, and amount of court resources required.⁶² DCM systems usually involve a court rule or general order that defines the tracks and establishes general procedures and requirements for cases assigned to each track.⁶³ In a basic version of DCM, courts categorize cases into three tracks—expedited, standard, and complex—and develop different procedures and case processing standards accordingly.⁶⁴ Some courts use additional tracks such as a track for “administrative” cases (such as routine *pro se* prisoner petitions or Social Security appeals) and a track for mass tort cases.⁶⁵ Under the Civil Justice Reform Act of 1990 (CJRA),⁶⁶ 77% of federal district courts adopted

⁵⁹ This study included findings suggesting the importance of judicial involvement. Although the research showed no increase in early consideration and use of ADR following implementation of the rule, it found that there was a reported increase of settlement discussion at some point in the litigation, which was strongly related to judicial encouragement and which generally occurred late in the litigation. Wissler & Dauber, *supra* note 11, at 262–65.

⁶⁰ See KAKALIK ET AL., *supra* note 51, at 47.

⁶¹ *Id.*

⁶² COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 29, at 130.

⁶³ *Id.*

⁶⁴ STEELMAN, *supra* note 27, at 19–20.

⁶⁵ See DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 92 (1997) (describing tracks in DCM system in the U.S. District Court for the Northern District of Ohio).

⁶⁶ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified in scattered sections of title 28 of the United States Code).

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some form of DCM as part of the cost and delay reduction plans for their courts.⁶⁷

DCM builds on the process of individual case management by providing structure and expectations for the courts, attorneys, and litigants. In a study by the Federal Judicial Center (FJC), judges said:

[A]ssigning a track designation sends a signal to attorneys about what the court's expectations for a case will be; sets goals for scheduling of various case events, including trial; helps the judge and attorneys organize and plan the case; and provides accountability for judges, prompting them to take an active role in the management of their cases. Attorneys also indicated that the track assignment helps them to organize and plan their case from the beginning.

Thus, track assignments, with their explicit goals and expectations, apparently provide structure and predictability from the outset of a case that is not always provided by individualized case management.⁶⁸

Typically, the DCM concept involves different treatment in litigation. A variation of this concept involves use of different ADR processes designated or brokered by the courts. The "multidoor courthouse" proposed by Professor Frank Sander is the classic DCM model for referral of court cases to ADR processes.⁶⁹ In his proposal for a multidoor courthouse, a screening clerk would assess a grievance and direct the grievant to go through the door to the most appropriate "room" in the court.⁷⁰ Thus, courts might have different metaphorical rooms for mediation, arbitration, fact-finding, malpractice screening, ombudsman, and trial.⁷¹ The purpose of the multidoor courthouse approach, as well as DCM systems assigning cases to different litigation tracks, is to "fit it the forum to the fuss."⁷²

⁶⁷ JUDICIAL CONFERENCE OF THE U.S., THE CIVIL JUSTICE REFORM ACT OF 1990: FINAL REPORT 27 (1997), available at www.uscourts.gov/library/cjra/cjrafin.pdf.

⁶⁸ STIENSTRA ET AL., *supra* note 65, at 82–83. Part of the structure is "a set of performance standards for each judge and the court as a whole to monitor how closely they are adhering to the court's disposition goals." *Id.* at 32.

⁶⁹ See Frank E.A. Sander, Professor of Law, Harvard Univ., Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7–9, 1976), in 70 F.R.D. 111, 130–32 (1976).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 49 (1994) (describing theory for matching cases and ADR processes); *Matching Fuss to Forum:*

Federal district courts have experimented with DCM with mixed results. The CJRA designated five “demonstration districts” to demonstrate use of case management and ADR systems.⁷³ According to a study by the FJC, three of the districts used DCM, and the judges were generally satisfied with the results, even though the research found limited reductions in litigation time and cost.⁷⁴ In one court, the judges believed that DCM produced greater uniformity and integrity in demonstrating the court’s responsibility for managing cases efficiently and being attentive to deadlines.⁷⁵ In another district, the judges believed that DCM contributed to a climate of getting cases moving by “forcing” early attention to the case and “sending a message” to the bar about the court’s policy requiring people to work together and maintain accountability.⁷⁶ In the third district, the attorneys believed that DCM caused them to assess cases, identify issues, and exchange information earlier than they otherwise would have.⁷⁷

D.C. Trial Court’s Creative ADR Case-Classification Procedures, 9 ALTERNATIVES TO HIGH COST LITIG. 44, 44 (1991) (describing the screening process in the multidoor courthouse in Washington D.C.).

Peter Salem and his colleagues describe a “triaging” process to refer parties in family cases to the most appropriate court intervention at the outset rather than using a “linear” model. Peter Salem et al., *Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen*, 27 PACE L. REV. 741, 749 (2007).

Under this [linear model], . . . [parties] begin with the service that is least intrusive and time consuming, and, if the dispute is not resolved, the family then moves to the next available process. Under this approach, each service tier is typically more intrusive and directive than the one preceding it. The services offered and number of processes available can vary dramatically from one jurisdiction to another; however, a typical progression might include a divorce education program, mediation, child custody evaluation or investigation, moderated settlement conference and, finally, a trial.

Id. This approach can consume a substantial amount of time and money by parties and courts and actually exacerbate conflict if parents “becom[e] increasingly polarized through repeated failed attempts to resolve their disputes. . . while. . . children must endure protracted conflict between their parents.” *Id.* at 750.

⁷³ STIENSTRA ET AL., *supra* note 65, at i. The CJRA specifically designated the five courts to demonstrate techniques of case management or ADR. These courts had histories of judicial support for these techniques, which they had used before enactment of the CJRA. Thus, these courts were not randomly selected, but were selected because of their experience and interest. *Id.* at i–iii.

⁷⁴ *Id.* at 9–10.

⁷⁵ *Id.* at 9.

⁷⁶ *Id.*

⁷⁷ *Id.* at 10.

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The CJRA also required the Judicial Conference of the United States to select ten “pilot” courts, which were required to use specified case management principles and techniques, and ten “comparison” courts, which were not required to use them.⁷⁸ The RAND Corporation compared the performance of these courts and found less support and satisfaction with DCM than in the demonstration districts studied by the FJC, though it is hard to interpret the results because virtually none of the pilot courts fully adopted a DCM system.⁷⁹ Four of the ten courts did not designate separate tracks, and judges used their discretion in tailoring the case management procedures to each case.⁸⁰ Of the remaining six courts that did designate tracks, five did not assign cases to tracks or assigned virtually all cases to the same “standard” track.⁸¹ Only one court assigned more than 2% of cases to the “complex” track.⁸² Given this lack of implementation, the study is more useful for identifying barriers to adoption of DCM than for assessing the operation of DCM systems themselves. Judges and lawyers reported that there were problems in identifying the appropriate tracks because judges wanted to tailor case management procedures rather than be subject to designated tracks and requirements.⁸³

DCM has been embraced in some state courts,⁸⁴ and the U.S. Justice Department and the National Center for State Courts have published guides encouraging courts to develop DCM systems.⁸⁵ DCM seems particularly appropriate for family courts because of the wide range of case characteristics in family cases and interventions available for these cases. High-conflict families and situations involving domestic abuse, for example, present particular challenges for family courts. Some of the services offered by family courts include: “(1) educational programs and group mediation

⁷⁸ See KAKALIK ET AL., *supra* note 51, at 3.

⁷⁹ See *id.* at 47–50. All of the pilot and comparison courts had previously used a separate process for cases requiring minimal court management, such as government loan collection cases and appeals from denials of Social Security benefits. The researchers considered that this “minimal management” track was not a real application of DCM for research purposes. *Id.* at 47–48.

⁸⁰ *Id.* at 48.

⁸¹ *Id.* at 49.

⁸² *Id.* at 48–49.

⁸³ *Id.* at 49–50.

⁸⁴ See Holly Bakke & Maureen Solomon, *Case Differentiation: An Approach to Individualized Case Management*, 73 JUDICATURE 17, 18 (1989–90) (listing jurisdictions that have implemented DCM programs).

⁸⁵ See generally BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, DIFFERENTIATED CASE MANAGEMENT (1993); STEELMAN, *supra* note 27.

processes for high-conflict families; (2) therapeutic mediation; (3) mediation-evaluation hybrid processes; (4) issue-focused, settlement-focused, or fast-track evaluations; and (5) parenting coordination.”⁸⁶ Studies have found that in family courts using DCM systems, disputes were resolved more quickly, the number of court hearings and the amount of repeat litigation were reduced, and, most importantly, the percentage of highly distressed children was reduced.⁸⁷

An FJC manual includes guidance to help courts decide which cases are appropriate for ADR and to match particular ADR processes to specific cases based on characteristics of the parties and cases.⁸⁸ The U.S. District Court for the Northern District of California, for example, operates a “Multi-Option Program,” a form of multidoor courthouse, for referral of cases to various ADR options.⁸⁹ In cases subject to this program, the lawyers or the court select an ADR process unless the court determines that the benefits would not outweigh the costs.⁹⁰ The court offers options of non-binding arbitration, early neutral evaluation, mediation, early settlement conference with a magistrate judge, or private-sector ADR.⁹¹ According to an FJC study, attorneys had favorable reactions to having a choice of ADR options. The study found that:

Attorneys who had selected their process were more likely to report that it lowered litigation costs, that it reduced the amount of discovery and the number of motions, that it was a fair process,

⁸⁶ Salem et al., *supra* note 72, at 752. Most of these processes are self-explanatory except parenting coordination, which is a process where a court appoints a neutral third party to help parents in high-conflict situations reach agreement, and in some cases, make decisions to implement parenting plans. See Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 246–47 (2004) (discussing parenting coordination as a new ADR process).

⁸⁷ ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 123 (2004) (summarizing empirical studies). For a general discussion of DCM in family courts, see *id.* at 113–24. For a description of an especially carefully developed DCM system of triaging cases in Connecticut family courts, see generally Salem et al., *supra* note 72.

⁸⁸ ROBERT J. NIEMIC ET AL., FED. JUDICIAL CTR., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 20–47 (2001), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/\\$file/ADRGuide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/$file/ADRGuide.pdf).

⁸⁹ STIENSTRA ET AL., *supra* note 65, at 177–82.

⁹⁰ *Id.* at 181.

⁹¹ *Id.* at 178–81.

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that their case settled because of the process, and that the benefits of the process outweighed its costs.⁹²

C. Early Neutral Evaluation

Early neutral evaluation (ENE) is a confidential process early in litigation where each side presents a summary of its position and a neutral expert provides an evaluation of the strengths and weaknesses of each party's case. Case planning, rather than settlement, may be the main objective of the process, depending on the ENE program's and parties' goals and whether the parties are ready to settle at the ENE meeting. If the parties do not fully settle the case after hearing the evaluation, the evaluator helps develop a case plan that is narrowly tailored to efficiently manage the case.⁹³ ENE has been used in federal and state courts and by federal agencies.⁹⁴ In family courts, there may be separate ENE processes for financial issues and for custody and family issues.⁹⁵ U.S. Magistrate Judge Wayne Brazil argues:

The ENE process expands the parties' information base for decisions about case development and about settlement, improves the quality of parties' analyses, and sharpens the joinder of issues. It also provides litigants with valuable impartial feedback from an expert about the merits of their positions, and with suggestions about how to acquire efficiently any additional evidence the parties need to engage in more productive settlement discussions.⁹⁶

⁹² *Id.* at 175.

⁹³ See Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?*, 14 DISP. RESOL. MAG. 10, 11 (2007). See also Yvonne Pearson, *Early Neutral Evaluation: A Creative Approach to Settling Custody and Parenting Time Disputes* (2005) (unpublished manuscript, Hennepin County, Minnesota, on file with author); Yvonne Pearson et al., *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672, 674 (2006); Fourth District, Minnesota Judicial Branch, Early Neutral Evaluation, <http://www.mncourts.gov/district/4/?page=1747> (last visited Feb. 23, 2009). The Hennepin County model uses a team of male and female neutral evaluators to provide confidence that the evaluators' feedback is gender neutral. E-mail from Tanja Manrique, Judge in the Fourth Dist. of Minnesota Family Court, to John Lande, author (Aug. 29, 2008, 14:42:00 CST) (on file with author).

⁹⁴ Pearson et al., *supra* note 93, at 673.

⁹⁵ Kevin J. McGrath & Joani C. Moberg, *Using Early Neutral Evaluations for Effective Representation*, HENNEPIN LAW., Apr. 19, 2007, at 22, available at <http://hennepin.timberlakepublishing.com/article.asp?article=1124&paper=1&cat=147>.

⁹⁶ Brazil, *supra* note 93, at 11.

Evaluations of ENE in civil cases have been generally favorable. Roselle Wissler summarized empirical studies and noted one study that found that ENE cases were slightly less likely to go to trial than cases not assigned to ENE.⁹⁷ One study found that there were fewer motions filed in ENE cases than cases not assigned to ENE, though there were no differences in objective costs or time before resolution.⁹⁸ Although the objective measures showed no difference in aggregate, substantial proportions of lawyers believed that it saved time and money in their cases.⁹⁹ The participants' assessments of ENE were generally quite positive. Most lawyers and parties believed that the process was fair and worth the resources invested.¹⁰⁰ In one study, most believed that the evaluator listened carefully, understood their perspectives, was an expert in the subject, accurately analyzed the issues, and was interested in exploring creative solutions.¹⁰¹ Most lawyers also believed that the evaluator was neutral and well-prepared.¹⁰²

Minnesota's Fourth Judicial District (Hennepin County) has used two ENE processes since 2002 with positive results.¹⁰³ The "Social" ENE program addresses custody and parenting time issues and the "Financial" ENE program addresses marital estate issues.¹⁰⁴ At the initial case management conference (ICMC), which occurs within three weeks of case filing, the parties and lawyers meet with their judge and discuss, among other things, whether they want to use one or both of the ENE processes.¹⁰⁵ The first ENE meeting occurs within ten days of the ICMC.¹⁰⁶ The Social ENE program is to be completed within thirty days of the ICMC and the Financial ENE program is to be completed within sixty days.¹⁰⁷ Evaluators give candid and credible opinions about likely trial outcomes, which provides an impetus for settlements.¹⁰⁸ If the parties do not settle, the evaluators help them and the court manage the litigation, including possible referrals to mediation or

⁹⁷ Wissler, *supra* note 52, at 65.

⁹⁸ *Id.* at 78.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Manrique, *supra* note 93.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

other procedures.¹⁰⁹ The average time expended per case in both types of ENE is less than six hours, compared with forty-five hours for a standard custody evaluation.¹¹⁰ Fourth District Judge Tanja Manrique reported, “[o]f the cases referred to for an ENE during 2008, about two-thirds of litigants currently self-select ENE and 74% of those referrals settle in whole or in part generally within a month of the referral.”¹¹¹ In the financial ENE program, the combined fees per case for both parties averaged about \$910.¹¹² Judge Manrique stated that the high settlement rate in ENE “yields substantial savings in court time which otherwise would have been spent on motion hearings, pretrial conferences, and trials.”¹¹³

D. Early Mediation

Although people often suggest that mediation reduces the amount of time and money spent in litigation, empirical research findings about this are mixed.¹¹⁴ Time and cost savings are presumably related to the time in the process when parties begin mediation because cases that start mediation late in litigation have less time and money to “save” compared to the normal litigation process. Attorneys have differing views about when cases are ready for mediation, and many believe that mediation is not appropriate until they have completed discovery or believe that they have enough information to make good decisions.¹¹⁵ A recent survey found that 81% of non-family civil mediation participants (those surveyed were primarily lawyers) believed that most mediations should begin after “critical discovery” is completed, but should not wait until all discovery is completed.¹¹⁶ The survey did not define “critical discovery,” so it is possible that many respondents believed that mediations generally should begin relatively late in the litigation process.

Some courts mandate that mediation begin early in litigation. For example, California conducted a test of early mediation pilot programs in

¹⁰⁹ Pearson, *supra* note 93, at 24.

¹¹⁰ Manrique, *supra* note 93.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Wissler, *supra* note 52, at 67–68.

¹¹⁵ See Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 904–06 (1998).

¹¹⁶ ABA SECTION ON DISP. RESOL., TASK FORCE ON IMPROVING MEDIATION QUALITY, FINAL REPORT 12 (2006–2008), available at <http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf>.

five courts and achieved very positive results.¹¹⁷ Under the statute authorizing the pilot programs, the initial case management conferences were to be held as early as 90 days after case filing and mediations were required to be scheduled within 60 days of the early case management conference.¹¹⁸ In practice, the case management conferences were often held between 90 and 150 days after filing and the deadline for completion of mediations was often 60 to 90 days after the conference.¹¹⁹ In San Diego and Los Angeles courts, the trial rates were reduced by 24%–30% compared with the control groups, which resulting in estimated potential savings of 521 trial days per year in San Diego (with an estimated saving of \$1.6 million) and 670 trial days per year in Los Angeles (with an estimated saving of \$2 million).¹²⁰ Use of mediation “had positive impact” in reducing disposition time, especially in courts with longer overall disposition times, though failure to settle in mediation led to longer disposition times.¹²¹ The attorneys who participated in mediations expressed satisfaction with the litigation process, court services, and their mediation experience.¹²² The litigants’ costs were estimated to have been reduced by almost \$50 million over 2 years in the 5 programs.¹²³ The court workloads were substantially reduced in four courts, with 18%–48% fewer motions and 11%–32% fewer “other” pretrial hearings.¹²⁴ In cases that settled at mediation, there were reductions of hearings of 30%–65%.¹²⁵

One study of a federal court program also suggests that early mediation can be effective.¹²⁶ In the “Early Assessment Program” (EAP) of the U.S.

¹¹⁷ JUDICIAL COUNCIL CAL., ADMIN. OFFICE OF THE COURTS, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS 2–3 (2004), *available at* <http://www.courtinfo.ca.gov/reference/documents/emp rept.pdf>.

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 6.

¹²⁰ *Id.* at 29 (finding focused on these two courts because they both had relatively short disposition times and good comparison groups).

¹²¹ *Id.* at 30.

¹²² *Id.*

¹²³ JUDICIAL COUNCIL OF CAL., *supra* note 117, at 31.

¹²⁴ *Id.*

¹²⁵ *Id.* Superior courts in Maine have successfully used a similar process in which parties must attend an ADR conference within 120 days of a scheduling order. Howard H. Dana, Jr., *Court-Connected Alternative Dispute Resolution in Maine*, 57 ME. L. REV. 349, 375 (2005). A study found that this program reduced the time to resolution, increased the settlement rate, reduced court involvement, and potentially reduced parties’ costs. *Id.* at 415.

¹²⁶ STIENSTRA ET AL., *supra* note 65, at 223.

District Court for the Western District of Missouri, lawyers and parties are required to meet with the program administrator within thirty days after responsive pleadings are filed.¹²⁷ This originally was a “demonstration” project under the CJRA and the subject of an experimental evaluation with random assignment of cases to a mandatory early mediation group, an optional mediation group, or a control group with no mediation.¹²⁸ At the initial meeting, the administrator gave advice about ADR options; helped develop a discovery plan, if appropriate; helped the parties identify areas of agreement; and explored the possibility of settling the case through mediation.¹²⁹ In virtually all the cases in the study, the administrator served as the mediator during the first meeting.¹³⁰ The mandatory mediation cases were terminated after an average of 7.0 months, compared with 9.7 months for the control group.¹³¹ When parties in the optional mediation group chose to mediate, the cases were terminated after an average of 9.2 months, which was greater than the 8.3 months for cases in the optional mediation group who did not choose to mediate.¹³² Of cases that had an early assessment session, 38% settled at the session, 19% settled within a month of the session, and an additional 18% settled within three months, for a total of 75% settlements within three months of the session.¹³³ These results suggest that mandatory mediation reduced the average time to disposition for cases in this group compared to cases in the control group because of the early settlements generated. The increased disposition time for cases using an early assessment meeting in the optional group presumably reflected the additional time needed to decide to use the program and schedule a meeting.¹³⁴ Almost two-thirds (63%) of the lawyers said that the process did not start too early, compared with only 11% who said that it did start too early.¹³⁵ The judges and lawyers were generally very satisfied with the program. “Most attorneys [participating] in an EAP session [found] that the program [functioned] well: the timing of the EAP session [wa]s appropriate and the program administrator [wa]s fair, well prepared, and engage[d] the parties in

¹²⁷ *Id.* at 225.

¹²⁸ *Id.* at 223, 227. Although the parties have the option of choosing other ADR processes, very few chose processes other than mediation. *Id.* at 230–33.

¹²⁹ *Id.* at 227.

¹³⁰ *Id.* at 233.

¹³¹ *Id.* at 219–20.

¹³² STIENSTRA ET AL., *supra* note 65, at 219–20.

¹³³ *Id.* at 236.

¹³⁴ *Id.* at 235.

¹³⁵ *Id.* at 242.

meaningful discussions.”¹³⁶ The “great majority” of lawyers in the EAP program believed that it reduced litigation cost, with a median estimated cost saving of \$15,000 per party.¹³⁷ As the authors noted, one should be cautious in generalizing from this study, which involved a single mediator who was a very experienced and highly respected court employee, and who provided mediation at no cost.¹³⁸ Moreover, the program had substantial support from the bench and bar.¹³⁹ This experiment does suggest that, under favorable circumstances, it is possible to begin mediation very early in a case with good aggregate results.

Good preparation for ADR is an important corollary to ECH, even when the ADR process occurs late in litigation. The ABA Section of Dispute Resolution’s Task Force on Improving Mediation Quality conducted a study of experienced mediators and mediation users, who overwhelmingly believe that preparation before a mediation session by mediators, lawyers, and parties is very important for the success of the process.¹⁴⁰

III. EARLY CASE HANDLING IN PRIVATE DISPUTE RESOLUTION

A. ADR Pledges and Contract Clauses

To encourage use of an ECH process, various groups have developed a non-binding “ADR pledge” under which parties or lawyers consider using ADR before engaging in full-scale litigation. The International Institute of Conflict Prevention and Resolution (“the CPR Institute” or “CPR”)¹⁴¹ has organized the oldest and best-known ADR pledge drive for its member corporations, which it began in 1983.¹⁴² This pledge states in part:

¹³⁶ *Id.* at 235.

¹³⁷ *Id.* at 236.

¹³⁸ STIENSTRA ET AL., *supra* note 65 at 222, 239.

¹³⁹ *See id.* at 222, 238–40.

¹⁴⁰ *See* ABA SEC. DISP. RESOL., *supra* note 116, at 6–13.

¹⁴¹ CPR is an organization of the largest corporations and the law firms that serve them. *See* Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 854 (1996). CPR has changed its name several times but has used the “CPR” acronym since it was founded in 1979 as the Center for Public Resources. *See* CPR International Institute of Conflict Prevention & Resolution Frequently Asked Questions, <http://www.cpradr.org/AboutCPR/FAQs/tabid/284/Default.aspx> (last visited Feb. 23, 2009).

¹⁴² *See* Cronin-Harris, *supra* note 141, at 862.

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In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.¹⁴³

In the mid-1990s, CPR developed a complementary pledge for major law firms,¹⁴⁴ which states: "First, appropriate lawyers in our firm will be knowledgeable about ADR. Second, where appropriate, the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute."¹⁴⁵ The pledges were intended to: "(1) provid[e] a cloak that allowed attorneys to advocate negotiation-prone processes to opponents as a matter of corporate policy; and (2) provid[e] management with a means of encouraging their internal staffs—managers and lawyers—to use ADR more routinely."¹⁴⁶ More than 4,000 operating companies and 1,500 law firms have signed these CPR pledges.¹⁴⁷ CPR surveyed corporations that had signed the pledge and found that more than half reported invoking the pledge at least once, two-thirds reported achieving cost savings as a result, and almost three-quarters stated that it affected how they handle disputes.¹⁴⁸ CPR is now considering whether to revise the corporate pledge to include additional commitments such as consideration of dispute resolution clauses in commercial contracts; education of officers, employees, and lawyers about

¹⁴³ The CPR International Institute for Conflict Prevention & Resolution Website — Pledge, <http://www.cpradr.org/AboutCPR/ADRpledge/AboutthePledge/tabid/161/Default.aspx> (last visited Feb. 23, 2009).

¹⁴⁴ Cronin-Harris, *supra* note 141, at 862–63. See also Kenneth L. Jacobs, *How to Implement an "Appropriate Dispute Resolution" Program in Your Litigation Department*, 76 MICH. B.J. 156, 158 (1997) (advocating use of ADR pledge by law firms, among other methods, to encourage ADR).

¹⁴⁵ The CPR International Institute for Conflict Prevention and Resolution Website, *supra* note 143.

¹⁴⁶ See Cronin-Harris, *supra* note 141, at 865–66. Although Cronin-Harris referred only to the corporate pledge, the law firm pledge undoubtedly was also intended to provide cover for law firms to justify consideration of ADR as a matter of the clients' corporate policy.

¹⁴⁷ The CPR International Institute for Conflict Prevention & Resolution Frequently Asked Questions, *supra* note 141.

¹⁴⁸ See *Pledges Encourage ADR Use, Cost Savings*, 15 ALTERNATIVES TO HIGH COST LITIG. 88, 88 (1997) (survey of approximately 140 corporations).

the pledge; and direction to lawyers to act consistently with the pledge.¹⁴⁹ CPR also produced more detailed pledges for specific industries including banking and financial services; chemicals; food; franchise; insurance; and non-prescription drug industries.¹⁵⁰ Other types of entities have adopted ADR pledges, including bar associations,¹⁵¹ state¹⁵² and federal¹⁵³ governmental entities, as well as organizations outside the U.S.¹⁵⁴

¹⁴⁹ CPR International Institute Conflict Prevention & Resolution, CPR 2008 Annual Meeting, Tab 6 (January 2008) (on file with author).

¹⁵⁰ The CPR International Institute for Conflict Prevention & Resolution Website—CPR Corporate and Law Firm Pledges, <http://www.cpradr.org/AboutCPR/ADRpledge/tabid/74/Default.aspx> (follow desired industry hyperlink under “Industry & Practice Area Commitments”) (last visited Feb. 23, 2009) (noting that the industry-specific pledges include commitments to use negotiation and mediation before litigation as well as model forms for initiating negotiation and mediation). See also *Guidance on New Technologies and Classic Techniques Topics: E-Commerce Risks and Being a Better Bargainer*, 18 ALTERNATIVES TO HIGH COST LITIG. 149, 156–58 (2000) (describing CPR e-commerce commitment, similar to ADR pledge); International Trademark Association—ADR Pledge, http://www.inta.org/index.php?option=com_content&task=view&id=1384&Itemid=22&getcontent=4 (last visited Feb. 23, 2009).

¹⁵¹ See, e.g., State Bar of California, Santa Clara County Bar Association—California ADR Pledge Program, <https://www.sccba.com/about/adrpledge.cfm> (last visited Feb. 23, 2009); Joel M. Douglas & Lynn J. Maier, *Bringing the Parties Apart: Divorce Mediation's Debt to Labor Mediation*, DISP. RESOL. J., Sept. 1994, at 29 (referring to ADR pledge of the ABA Family Law Section); Alan Van Etten, *Lights, Camera, Action! ADR Campaign Rolls Out*, HAW. B.J., Oct. 1997, at 4 (describing Hawaii State Bar Association's ADR Pledge Program); *ADR Pledge in Ohio*, 11 ALTERNATIVES TO HIGH COST LITIG. 57, 57 (1993) (describing pledge drive organized by the Ohio State Bar Association and the Ohio Chamber of Commerce).

¹⁵² See, e.g., *The Pledge That Helps Avoid Litigation*, 17 ALTERNATIVES TO HIGH COST LITIG. 24, 24 (1999) (stating that Delaware Legislature passed a resolution encouraging the state's corporate citizens to adopt an ADR pledge into their bylaws); Maryland Mediation and Conflict Resolution Office, *Take the ADR Pledge*, <http://www.courts.state.md.us/macro/pledge.html> (last visited Feb. 23, 2009) (promoting ADR pledge for businesses and law firms by the agency of the Maryland judiciary).

¹⁵³ See, e.g., U.S. Department of Justice, *Electronic Guide to Federal Procurement ADR: ADR Pledge*, <http://www.usdoj.gov/adr/adr%20guide/adrpledge.html> (last visited Feb. 23, 2009); Jeffrey M. Senger, *Federal ADR Council Invites Comments, Sets Agenda*, 18 ALTERNATIVES TO HIGH COST LITIG. 193, 193 (2000) (noting that Federal ADR Council issued an ADR pledge and encouraged agency heads to sign it).

¹⁵⁴ See, e.g., Department for Constitutional Affairs, *Monitoring the Effectiveness of the Government's commitment to using Alternative Dispute Resolution (ADR) (2002)*, http://www.dca.gov.uk/civil/adr/adrrep_0102.htm (last visited Feb. 23, 2009) (including ADR pledge for all government departments in the United Kingdom); *CPR News: An International Docket: Highlights from CPR's Paris Spring Meeting*, 25 ALTERNATIVES

ADR pledges promote awareness of ADR and legitimacy in using ADR (including ECH processes). Undoubtedly, they prompt some parties and lawyers to seriously consider their choice of dispute resolution options and use ADR in some cases. There are limits to their effectiveness, however. For example, the CPR pledge is not intended to be legally enforceable¹⁵⁵ and is drafted to give each party discretion whether to use ADR or not.¹⁵⁶ As one might expect, merely signing an ADR pledge does not necessarily mean that an organization's leaders or rank-and-file members believe in the policy or act fully consistent with it. Professor Craig McEwen conducted in-depth studies of disputing in six corporations and generally found no connection between corporate ADR policy and actual ADR usage.¹⁵⁷ Of the six corporations he studied, two rarely initiated ADR, two did so occasionally, and two were strongly committed to ADR, especially mediation.¹⁵⁸ These differences were observed despite the fact that five of the six corporations had signed the CPR pledge.¹⁵⁹ McEwen quoted one attorney who said, "[w]e are pro-ADR in theory but when you get down to specifics, it's a hard pill to swallow. We haven't seen many opportunities to use it."¹⁶⁰ In addition, signing a pledge does not necessarily mean that organizations will use dispute resolution clauses in contracts.¹⁶¹ Although signing ADR pledges

TO HIGH COST LITIG. 114, 125 (2007) (describing pledge efforts in France and an association of ten countries in northern Africa and the Middle East); CPR International Institute Conflict Prevention & Resolution, *supra* note 149 (including "Euro-Mediterranean Charter on Appropriate Dispute Resolution" signed by representatives of "the Arab Union of Lawyers and Egyptian Bar Association, the Council of the Bars and Law Societies of the European Union (CCBE), and the Union of Turkish Bars.").

¹⁵⁵CPR International Institute of Conflict Prevention and Resolution Frequently Asked Questions, *supra* note 141.

¹⁵⁶ Joseph A. Greenaway, Jr., *Proceeding to Yes: A Federal Judge Looks at ADR's Future*, 25 ALTERNATIVES TO HIGH COST LITIG. 3, 3-4 (2007) ("[T]he CPR pledge allows an adherent two opportunities to politely decline participation in ADR: (1) if the dispute is not 'suitable' for ADR; and (2) if the result is not 'satisfactory,' any party may proceed to litigation.").

¹⁵⁷ See McEwen, *supra* note 7, at 4-5.

¹⁵⁸ *Id.* at 5.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 13; See also John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 196 (2000) (quoting an attorney saying, "A lot of [top business executives] have signed the CPR pledge themselves. Again, I don't always see them as willing once a dispute begins to get into them. In theory, that's the thing to be in favor of.").

¹⁶¹ *Last-Minute Registration Still Available for CPR's Annual Meeting, Coming on Jan. 17-18*, 26 ALTERNATIVES TO HIGH COST LITIG. 13, 13-14 (2008). At a recent CPR meeting, one program was entitled, "You Say You Want to, But You Don't: Crafting

does not necessarily cause people to follow the pledges, they can be useful parts of a larger strategy to stimulate people to seriously consider their dispute resolution options early in a case.

Parties often use provisions in contracts requiring use of mediation and/or arbitration when there is a dispute arising from the contract. Unlike general ADR pledges, ADR contract provisions apply to disputes between specific parties and generally are legally enforceable. These arrangements for mediation and arbitration clauses are quite different from each other because parties in mediation are not required to reach agreement whereas binding arbitration results in enforceable awards.

For mediation contract clauses, there generally is no statutory authorization for court enforcement and there is relatively little decisional authority. The few cases that have analyzed this issue generally suggest that parties who do not comply with well-drafted contractual provisions to mediate may be ordered to mediate or have their claims dismissed.¹⁶²

Contract provisions requiring parties to arbitrate are enforceable under the Federal Arbitration Act and state statutes, such as those modeled on the Revised Uniform Arbitration Act.¹⁶³ Well-designed provisions are especially appropriate between commercial entities who specifically negotiate the provision. There is significant controversy about the appropriateness of such provisions binding employees and consumers that are not individually negotiated and that require them to arbitrate if they want to be employed or purchase a good or service.¹⁶⁴ Analysis of the appropriateness of such provisions is beyond the scope of this article.

Researchers at the Herbert Smith law firm who conducted a recent study of twenty-one major international U.S. and European corporations were surprised by:

Dispute Management Clauses as a Matter of Organizational Policy and Practice.” The program description stated, “[c]onsidering how many companies and law firms have subscribed to the CPR Pledges, it’s remarkable how few commercial contracts feature sophisticated dispute resolution clause drafting.” *Id.*

¹⁶² Kathleen M. Scanlon & Adam Spiewak, *Enforcement of Contract Clauses Providing for Mediation*, 19 ALTERNATIVES TO HIGH COST LITIG. 1, 1 (2001); see 1 SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY AND PRACTICE* Ch. 8 (2d ed. 2007).

¹⁶³ See 9 U.S.C. §§ 3–4, 10 (2008) (providing for stay of litigation pending arbitration, order to compel arbitration, and enforcement of arbitration awards); REV. UNIF. ARB. ACT §§ 7, 22 (2000) (similar provisions).

¹⁶⁴ See generally Jay Folberg, *Symposium: Mandatory Arbitration Clauses*, 38 U.S.F. L. REV. 1 (2003) (symposium including arguments favoring and opposing enforcement of mandatory pre-dispute arbitration clauses in certain situations).

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a strong and consistent challenge to the received wisdom that the use of ADR clauses in contracts should be an integral part of how organisations use ADR. We found that whilst the majority of organisations were strongly in favour of ADR, this did not translate in practice into a desire to use ADR clauses in their contracts. The motivation underlying this position differed between the organisations but the result was a clear rejection of compulsory ADR clauses.¹⁶⁵

Some of the reasons that businesses resisted using ADR clauses included the belief that such clauses were unnecessary given the business's high usage of ADR and a desire to maintain flexibility.¹⁶⁶ Nonetheless, some corporations were more likely to favor ADR clauses in some situations such as in "high volume/bulk contracts" (as "opposed to highly negotiated contracts"), when British companies were dealing with U.S. companies (possibly because of the desire to avoid perceived high cost of litigation in the U.S.), and when such provisions were customary or requested by the other party.¹⁶⁷

Well-designed agreements could promote efficient early case handling by utilizing streamlined processes and dispute resolution professionals with substantial expertise. Parties may have difficulty crafting such provisions, however, because it can be difficult to anticipate the problems that might arise and know how best to manage a case. In addition, it can be awkward to negotiate provisions anticipating disputes when beginning a contractual relationship. The Herbert Smith researchers suggested that clauses allowing ADR use but not requiring it may provide a good balance between ensuring that ADR is on the "radar screen" and maintaining flexibility in actually handling cases.¹⁶⁸

B. Early Case Assessment and ADR Screening Protocols

Assessing cases early in a dispute is an essential step in managing them efficiently. This is necessary because parties have choices about which dispute resolution process to use and some are more appropriate than others in given cases. Thus, some parties may do a more or less formal early case analysis (ECA) to help make these decisions. This process in private dispute resolution is somewhat similar to deciding which track to use in

¹⁶⁵ HERBERT SMITH, THE INSIDE TRACK—HOW BLUE-CHIPS ARE USING ADR 36 (2007), available at <http://www.herbertsmith.com/NR/rdonlyres/FA4F7B4B-8246-404A-82CE-EF0019375CA7/5093/6398ADRreportD4.pdf>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 37–38.

¹⁶⁸ *Id.* at 38.

differentiated case management and multidoor courthouse systems in court cases.¹⁶⁹ Some major corporations such as Motorola, Aetna, Boise Cascade, and AT&T have developed increasingly sophisticated ECA protocols in their standard procedures for handling cases.¹⁷⁰ These protocols entail an assessment of factors such as the interests and goals of the parties, amount at stake, and expected litigation results using litigation risk (or “decision-tree”) analysis.¹⁷¹ The CPR Institute has developed a detailed ECA form that collects information about the case, stage of litigation, contractual obligations for dispute resolution, key individuals who would be involved, summary of initial factual investigations and key information that is still unknown, accounts of contacts with the opposing party or lawyer, background of the client, interests of the client and other party, analysis of the legal merits, insurance coverage, and cost-benefit analysis.¹⁷² Motorola lawyers carefully monitor their cases and believe that their use of ECA directly contributes to savings of time and money. For example, of the seventeen employment cases that were concluded in 1993, eleven were resolved before the discovery phase, which is when the costs typically begin to rise sharply.¹⁷³

A recent study of twenty-one major international U.S. and European corporations found that the use of ECA is a critical factor in distinguishing corporations’ sophistication about dispute resolution.¹⁷⁴ The researchers created a typology of four categories of corporations, including “embedded users” (where “ADR plays a central role in their dispute resolution culture”), “ad hoc users” (who value flexibility in their use of ADR), “negotiators”

¹⁶⁹ See *supra* Part II.B.

¹⁷⁰ See Cronin-Harris, *supra* note 141, at 868.

¹⁷¹ *Id.* at 875. For descriptions of decision-tree analysis, see generally David P. Hoffer, Note, *Decision Analysis as a Mediator’s Tool*, 1 HARV. NEGOT. L. REV. 113 (1996); David M. Madden, *To Sue or Not to Sue: A Hypothetical Case Study in the Use of Decision Trees in Developing Litigation Strategy*, DCBA BRIEF, Nov. 2007, at 16.

¹⁷² International Institute of Conflict Prevention & Resolution, CPR Early Case Assessment “ECA” Guidelines (draft revision 2008) (on file with author). See also Kenneth Kressel et al., *A Field Report on the New CPR Mediation Screen*, 21 ALTERNATIVES TO HIGH COST LITIG. 133, 143–44 (2003) (reporting small study of screen for appropriateness of mediation finding that lawyers’ perceptions of the benefits of mediation and the suitability of the situation for mediation independently predicted whether lawyers would stipulate to use of mediation).

¹⁷³ Hans U. Stucki, *Measuring the Merit of ADR*, 14 ALTERNATIVES TO HIGH COST LITIG. 81, 90 (1996).

¹⁷⁴ See SMITH, *supra* note 165. McEwen reported similar findings about the significance of ECA in good management of disputing. In a study of six corporations, only one corporation had a coherent approach to disputing and ECA was central to its system. McEwen, *supra* note 7, at 15.

(who prefer to negotiate and use ADR after unsuccessful negotiation), and “non-users.”¹⁷⁵ As these descriptions suggest, the embedded users were the most assertive in managing their dispute resolution processes.¹⁷⁶ For these corporations, using ECA or similar informal guidelines was critical to achieve a consistent approach to case management.¹⁷⁷ Some corporations, typically with fewer or smaller cases, believed that an informal assessment process was better suited to their needs than a more elaborate (and seemingly burdensome) formal ECA protocol.¹⁷⁸

Using ECA by itself does not necessarily lead to decisions about what dispute resolution process to use. There have been various efforts to develop screening tools to help parties and lawyers make decisions about the most appropriate process. For example, Professors Frank Sander and Lukasz Rozdeiczner developed a system providing indicators of appropriateness of six dispute resolution processes based on the parties’ goals, features of processes that are likely to promote effective resolution, and ability of the processes to overcome impediments to settlement.¹⁷⁹ They recommend a presumption in favor of using mediation unless there are contra-indications that outweigh the benefits of mediation.¹⁸⁰

CPR has developed an “ADR Suitability Guide” designed to help select appropriate processes in business disputes.¹⁸¹ Like Sander and Rozdeiczner’s approach, the CPR screening tool starts with a rebuttable presumption that mediation is appropriate and focuses on the parties’ goals, the suitability of the dispute for a problem-solving process, and the potential benefits of mediation in the case.¹⁸² The CPR tool provides a detailed questionnaire to help parties and lawyers make these assessments.¹⁸³ In the context of family disputes, John Lande and Gregg Herman developed a framework for

¹⁷⁵ SMITH, *supra* note 165, at 10–17.

¹⁷⁶ *Id.* at 11.

¹⁷⁷ *Id.* at 12.

¹⁷⁸ *Id.* at 13. The “embedded users” also preferred to use mediation at an earlier stage in a case than the other types of users. *Id.* at 20.

¹⁷⁹ Frank E. A. Sander & Lukasz Rozdeiczner, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 10–12 (2006) (proposing framework to match cases with mediation, minitrial, summary jury trial, early neutral evaluation, arbitration or private judging, and court processes).

¹⁸⁰ *Id.*

¹⁸¹ INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, ADR SUITABILITY GUIDE (2006).

¹⁸² *Id.* at 4–28.

¹⁸³ *Id.* at 22–25.

assessing the appropriateness of unassisted negotiation, mediation, Cooperative Practice, Collaborative Practice, and traditional litigation based on the parties' capabilities, their attitudes about different types of professional services, and their risk assessments and preferences.¹⁸⁴

Using an ECA or ADR screen requires some resources and organizations may set a threshold for using them. For example, one lawyer described his experience as an inside counsel as follows:

As ADR Coordinator, we required the completion of an ADR screen when each dispute came in that involved in excess of [\$50,000] or would require an outside counsel budget in excess of [\$10,000]. Once we had the screen, we'd continue to track progress by means of a quarterly report/"nag" to [ensure] that ADR continued to be considered. The [general counsel] was copied on the quarterly report and occasionally would inquire of the responsible attorneys "why ADR was not yet appropriate." Even the threat of such a call was a powerful incentive to keep folks on the ADR track.¹⁸⁵

In that organization, apparently there was a presumption favoring use of ADR over traditional litigation, but this is not an essential feature of early case analysis or ADR screening.

C. Settlement Counsel

When parties want lawyers to focus on negotiation early in a dispute, they may negotiate through "settlement counsel," a process used primarily in large business disputes.¹⁸⁶ Settlement counsel often operate in parallel with

¹⁸⁴ John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 284-88 (2004).

¹⁸⁵ *Inside the Corporation: Involving Business Managers in ADR*, 16 ALTERNATIVES TO HIGH COST LITIG. 151, 156-57 (1998).

¹⁸⁶ See generally Kathy A. Bryan, *Why Should Businesses Hire Settlement Counsel?*, 2008 J. DISP. RESOL. 195; Coyne, *supra* note 7; Charles B. Craver, *Negotiation as a Distinct Area of Specialization*, 9 AM. J. TRIAL ADVOC. 377 (1986); Roger Fisher, *What About Negotiation as a Specialty*, 69 A.B.A. J. 1221 (1983); James E. McGuire, *Why Litigators Should Use Settlement Counsel*, 18 ALTERNATIVES TO HIGH COST LITIG. 107 (2000). Although the settlement counsel process can be used at any point in a dispute, clients can generally achieve the greatest benefit by doing so early in a case. See Coyne, *supra* note 7, at 411. The term "resolution counsel" is sometimes used instead of settlement counsel. See Robert A. Creo, *Mediation 2004: The Art And The Artist*, 108 PENN ST. L. REV. 1017, 1029 (2004).

litigation counsel, who focus exclusively on litigation and do not negotiate the case.¹⁸⁷ Settlement counsel and litigation counsel may be from the same law firm or from separate firms.¹⁸⁸ Moreover, inside counsel sometimes act as settlement counsel.¹⁸⁹

The separation of functions between settlement and litigation counsel enables lawyers in both roles to focus solely on their own functions and avoid problems caused by combining the functions. Both are charged by their common client to accomplish the client's goals, but use different methods.¹⁹⁰ In effect, settlement counsel plays the "good cop" to the litigation counsel's "bad cop."¹⁹¹ Typically, settlement counsel are engaged early in the dispute and begin by meeting with the client, doing an initial investigation of the facts and parties' interests, and determining whether the other side is open to

¹⁸⁷ Fisher, *supra* note 186, at 1224. Parties may begin with both settlement counsel and litigation counsel or with just one or the other. If parties begin with only one type of counsel, they may add the other later in the dispute if appropriate. See Coyne, *supra* note 7, at 410–11.

¹⁸⁸ Fisher, *supra* note 186, at 1224; McGuire, *supra* note 186, at 121.

¹⁸⁹ Fisher, *supra* note 186, at 1224; McGuire, *supra* note 186, at 121. For discussion of advantages and disadvantages of having settlement counsel and litigation counsel in the same firm, see *The Future of ADR Lawyering*, 19 ALTERNATIVES TO HIGH COST LITIG. 113, 119 (2001).

¹⁹⁰ McGuire, *supra* note 186, at 120. Litigation counsel necessarily focus on achieving remedies that could be ordered by a court whereas settlement counsel may have flexibility to focus on a broader range of client business interests and arrangements. *Id.*

¹⁹¹ Coyne, *supra* note 7, at 410. McGuire illustrates the value of using separate counsel with a hypothetical situation where the client decides to file suit:

Settlement counsel need not break off communications just because one side or the other decides to commence litigation. It is difficult for the litigator to say convincingly, "We filed suit this morning, but we still want to talk this afternoon." Settlement counsel can say, "The litigation team started suit this morning, but my job is still to continue to talk settlement this afternoon."

McGuire, *supra* note 186, at 120.

Use of both a "good" and "bad cop" can counteract perceptions that a party is negotiating out of weakness. For example, a settlement counsel can approach the other side by saying:

This case just came into the office. My partner is dying to litigate it and says he is confident of a spectacular victory. My job is to see if I can produce a fair settlement, one that I can persuade our client is better—all things considered—than litigation. Let's see what we can do.

Fisher, *supra* note 186, at 1223.

immediate negotiations.¹⁹² If both sides want to proceed, settlement counsel helps the client analyze the alternatives, which may involve a more or less formal litigation risk analysis, and then develops a plan and schedule based on the client's goals and budget.¹⁹³ Settlement counsel then negotiates with the other side, typically following some informal exchange of information.¹⁹⁴ The process is conducive to interest-based negotiation, where the goal is to satisfy the interests of both parties, but the approach to negotiation may vary from one case to another.¹⁹⁵ If needed, the parties can use mediation or other ADR processes; settlement counsel are especially well-suited to represent the clients in those processes.¹⁹⁶

Clients who use settlement counsel essentially bet that the benefits, including savings from reduced legal costs and the possibility of more favorable results, will outweigh the costs and risks of litigation.¹⁹⁷ There are several models of fee arrangements, which permit clients and settlement counsel to allocate the risks and rewards between them. Since it is generally easier to estimate negotiation costs than litigation costs, a fixed total or monthly fee may be appropriate.¹⁹⁸ Settlement counsel may be paid for particular tasks, such as factual investigation, preparation of a decision tree, and conducting a settlement meeting.¹⁹⁹ The client and lawyer may agree in advance on a target "resolution value" and share any savings achieved above that value.²⁰⁰ They may agree to a contingency agreement under which the settlement counsel gets a premium (perhaps a higher hourly rate) if the matter is settled and reduced or no compensation if the matter is not settled.²⁰¹ Even if a settlement counsel does not directly settle a case, the

¹⁹² Coyne, *supra* note 7, at 403. Although settlement counsel need to identify counterparts on the other side with whom to negotiate, it is not essential that the other side also use counsel whose authority is limited to negotiation.

¹⁹³ *Id.*; See McGuire, *supra* note 186, at 107 (settlement counsel focus on basic questions including the business objectives of all parties, the information each party needs to make sound decisions, and an analysis of the alternatives including both settlement and litigation). For description of litigation risk analysis, see *supra* text accompanying note 171.

¹⁹⁴ Coyne, *supra* note 7, at 403.

¹⁹⁵ *Id.* at 403–04.

¹⁹⁶ See *id.* at 404; McGuire, *supra* note 186, at 120–21.

¹⁹⁷ See Coyne, *supra* note 7, at 408–09.

¹⁹⁸ *Id.* at 409.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *id.* at 409–10; McGuire, *supra* note 186, at 121–22. See also Cronin-Harris, *supra* note 141, at 877 (describing incentive structures for inside and outside counsel to

client may realize benefits such as receiving a second opinion independent of the trial counsel's analysis, laying the groundwork for later settlement, improving communications and relationships between the adversaries, focusing the litigation on key issues, and reducing litigation costs even if the case is tried.²⁰²

Settlement counsel may be used for individual cases, including major multi-party disputes, as well as consolidated and class action litigation involving multiple claims.²⁰³ For example, in 2001, Bridgestone/Firestone developed a settlement counsel program to settle the large volume of product liability cases arising from tires installed in Ford Explorer vehicles. There were numerous cases filed in various federal and state courts and the settlement program resolved more than 350 cases.²⁰⁴ The use of settlement counsel has also facilitated the distribution of billions of dollars from a fund created by a settlement of litigation by Holocaust victims against European corporations.²⁰⁵ Several major trucking companies use a variation of a settlement counsel process, which involves "'negotiation counsel,' who facilitates early settlements through an empathetic, problem-solving approach that employs a heavily front-loaded investigation, face-to-face expressions of genuine sorrow for tragic losses, and in appropriate cases,

achieve the clients' goals); Debra Cassens Weiss, *Ohio Law Firm Switches to Success-Fee Billing*, ABAJOURNAL.COM, July 7, 2008, http://www.abajournal.com/weekly/ohio_law_firm_switches_to_fixed_rate_billing (last visited Feb. 23, 2009) (describing "success fee" arrangements that may be based on "whether a corporation is able to get the case dismissed or to settle the case within a defined time period, whether the payout is less than a set amount, and whether the corporation's insurance carrier covers the payout.").

²⁰² See Coyne, *supra* note 7, at 410.

²⁰³ James E. McGuire et al., *Settlement Counsel: What is it? Why Should You Care?*, Section of Dispute Resolution, A.B.A., Annual Conference Materials Slide 4, April 4, 2008, available at <http://www.abanet.org/dispute/documents/SettlementCounselSlidesHandout.ppt#295>.

²⁰⁴ See David Dumas et al., *Bridgestone/Firestone's National Settlement Counsel Program: A Creative and Innovative Application of ADR Principles in Complex, Multi-Party and Multi-Jurisdictional Litigation* (2003), available at <http://www.abanet.org/dispute/documents/BridgestoneFirestonesNationalSettlementCounsel%20Program.pdf>. Bridgestone/Firestone won the CPR Award for Outstanding Practical Achievement for its Early Resolution Program and its use of national settlement counsel. *Reno, Bridgestone/Firestone, and the ABA's Dispute Resolution Section Win CPR Awards*, 22 ALTERNATIVES TO HIGH COST LITIG. 18, 18 (2004).

²⁰⁵ See generally Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 795-812 (2002).

apologies and payment of 'no strings attached' funds for the immediate needs of the claimant families."²⁰⁶

Professionals other than lawyers may act as a kind of settlement counsel in some organizations. For example, Children's Healthcare of Atlanta uses a pediatric nurse with clinical and risk management experience to serve as in-house "litigation manager" in dealing with complaints from claimants.²⁰⁷ After a claim has been received, the litigation manager does some preliminary investigation and contacts the claimants or their lawyers.²⁰⁸ The litigation manager suggests having an informal meeting where they begin a process of exchanging information and attempting resolution.²⁰⁹ Based on these discussions and its internal investigation, Children's tries to negotiate, uses facilitative mediation if necessary, and litigates only as a last resort.²¹⁰ By using this process, Children's estimates that it reduces the average length of claims from 36 to 18 months and saves an average of about \$52,000 per case in defense costs.²¹¹ Children's executives find that their staff benefits both emotionally and professionally by engaging patients with information rather than an adversarial litigation process.²¹² Children's management believes that this approach is consistent with its organizational mission and enhances its position in the community.²¹³

Using both settlement counsel and litigation counsel in a case involves risks of duplication of efforts, internal conflict within one side, and additional expense. There are ways to manage these risks, starting with an initial assessment of whether use of settlement counsel would be helpful in a given case.²¹⁴ A settlement counsel process may be appropriate when there is the potential for a continuing relationship between the parties, the conflict may be due (at least, in part) to misunderstandings, and the amount at issue does not justify large anticipated litigation costs.²¹⁵ On the other hand, a settlement counsel process is probably not appropriate when immediate court

²⁰⁶ Jim Golden et al., *The Negotiation Counsel Model: An Empathetic Model for Settling Catastrophic Personal Injury Cases*, 13 HARV. NEGOT. L. REV. 211, 215 (2008). For distinctions between this negotiation counsel model and settlement counsel, see *id.* at 245-46.

²⁰⁷ Hetzler, *supra* note 19, at 894-95.

²⁰⁸ *Id.* at 898-99.

²⁰⁹ *Id.* at 899-900.

²¹⁰ *Id.* at 900-02.

²¹¹ *Id.* at 896.

²¹² *Id.* at 897.

²¹³ Hetzler, *supra* note 19, at 897-98.

²¹⁴ See Coyne, *supra* note 7, at 411-12.

²¹⁵ *Id.* at 411.

action is needed, there are serious doubts whether the other side intends to negotiate sincerely, or the case can be handled well by a single lawyer or firm without using separate settlement counsel.²¹⁶

Internal conflict can be avoided by developing a clear, three-way agreement between the client, settlement counsel, and litigation counsel. Under such an agreement, the client controls both negotiation and litigation and the settlement counsel and litigation counsel do not operate in each other's area.²¹⁷ For example, settlement counsel will not offer "stand-still" agreements deferring litigation pending negotiation or be involved in discovery, and litigation counsel refer all settlement overtures to settlement counsel.²¹⁸

D. Collaborative Practice²¹⁹

Like the use of settlement counsel, Collaborative Practice (CP)²²⁰ involves lawyers who are committed exclusively to negotiation. In CP,

²¹⁶ *Id.*

²¹⁷ There are differing views about whether information obtained by settlement counsel should be provided to litigation counsel. McGuire, *supra* note 186, at 121 (arguing that settlement counsel can guarantee that information produced in the process will not be used in any litigation and will not be provided to litigation counsel); *contra* Coyne, *supra* note 7, at 408 (arguing that settlement counsel should provide litigation counsel with detailed information including a summary of settlement negotiations). For the process to work effectively, there should be a clear understanding about this, noted in an agreement, between the client, settlement counsel, and litigation counsel. In addition, the other side must be aware of and comfortable with the arrangement in order to maintain its willingness to negotiate seriously.

²¹⁸ See James E. McGuire et al., *supra* note 203, at slide 3.

²¹⁹ This part is adapted from my prior articles including John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003) [hereinafter Lande, *Possibilities for Collaborative Law*]; John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007) [hereinafter Lande, *Principles for Collaborative Law*]; John Lande, *The Promise and Perils of Collaborative Law*, DISP. RESOL. MAG., Fall 2005, at 29 [hereinafter Lande, *Promise and Perils of Collaborative Law*].

²²⁰ Collaborative Practice is sometimes referred to as "Collaborative Law" or "Collaborative Family Law," or "Collaborative Divorce." Many CP cases involve major roles of professionals from other professions, such as mental health and financial professionals. Thus, "Collaborative Law" gives a misleading impression and is disfavored by many CP practitioners. This article also adopts the convention of capitalizing these terms to distinguish the formal process from processes that are

however, this commitment is embodied in a written participation agreement with a “disqualification” provision that precludes any of the CP lawyers from representing the parties if they engage in contested litigation against each other.²²¹ Although CP lawyers cannot litigate a case, the parties can always withdraw and hire litigation counsel. The participation agreements establish rules for the process, including requirements to focus exclusively on negotiation, disclose all relevant information, and use an interest-based approach to negotiation.²²² The parties and lawyers work primarily in “four-way meetings” where parties are expected to participate actively.²²³ Many groups of CP practitioners promote a multi-disciplinary approach throughout the case, using a team of professionals in allied fields, including neutral financial and child development experts as well as mental health professionals serving as “coaches” for each party.²²⁴

The disqualification agreement creates strong incentives for all the parties and professionals to stay in CP negotiation. If the process terminates, the parties must incur the additional time and expense of hiring new lawyers (and other professionals) if they want representation in litigation²²⁵ and the CP practitioners have a “failed” case and no further fees in the matter.²²⁶ Practitioners report that this creates a safe “container” to keep everyone focused on interest-based negotiation rather than posturing about possible litigation since it is costly to terminate a CP case.²²⁷

Since the CP movement began in 1990, it has grown rapidly and legal authorities have embraced it with remarkable speed.²²⁸ There are more than 120 local CP practice groups in the U.S. which develop local practice protocols, train practitioners, build demand for CP, and form referral

generally collaborative but that do not include the formal elements of Collaborative Practice.

²²¹ Lande, *Promise and Perils of Collaborative Law*, *supra* note 219, at 29

²²² *Id.*

²²³ Lande, *Possibilities for Collaborative Law*, *supra* note 219, at 1320.

²²⁴ *Id.* at 1317–24; Lande, *Promise and Perils of Collaborative Law*, *supra* note 219, at 29.

²²⁵ See Lande, *Possibilities for Collaborative Law*, *supra* note 219, at 1322–23.

²²⁶ See Lande, *supra* note 6, at 221. Although parties may feel that a Collaborative process is valuable even if they do not reach agreement in the process, practitioners often refer to such cases as “failures.” See *id.*

²²⁷ See PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 78 (2001) (The “container” metaphor suggests a process where the parties and lawyers are protected from adversarial pressures of litigation.).

²²⁸ Lande, *Possibilities for Collaborative Law*, *supra* note 219, at 1325–28.

networks.²²⁹ The International Academy of Collaborative Professionals, an organization with several thousand members, publishes a newsletter, manages a website, does public relations, holds annual conferences, and sets standards.²³⁰ Legislatures and courts have enacted rules exempting CP cases from normal case-management procedures.²³¹ The Uniform Law Commission has appointed a committee to draft a Uniform Collaborative Law Act.²³²

Although CP principles could be applied in almost any civil case, virtually all CP cases have been family law matters.²³³ The disqualification agreement is a major barrier to use in non-family cases because parties and lawyers may invest substantial financial and other resources in their lawyer-client relationship and have generally been unwilling to risk losing that relationship if the other side decides to terminate the CP process.²³⁴

There have been two empirical studies of CP. William Schwab conducted a survey of CP lawyers and clients who reported that about 90% of cases settled in CP negotiation, the process took an average of 6.3 months, and the average cost was \$8,777.²³⁵ CP clients were “white, middle-aged, well educated and affluent,” with 84% reporting combined annual income exceeding \$100,000 and 40% over \$200,000.²³⁶ The most common reasons

²²⁹ *Id.*; John Lande & Forrest S. Mosten, Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law 23 (Feb. 17, 2009) (unpublished manuscript on file with the author).

²³⁰ Lande, *Possibilities for Collaborative Law*, *supra* note 219, at 1325–28; Lande & Mosten, *supra* note 229, at 22–23.

²³¹ Lande, *Promise and Perils of Collaborative Law*, *supra* note 219, at 29; see Lande, *Principles for Collaborative Law*, *supra* note 219, at 626–27.

²³² Uniform Law Commission, Collaborative Law, <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279> (last visited Feb.23, 2009).

²³³ Despite great efforts to use CP in non-family matters, there have been only eight civil cases (six in one Canadian province) as of 2006. David Hoffman, Open Letter to the Collaborative Practice Community and IACP, *available at* http://www.bostonlawcollaborative.com/documents/Letter_to_CP_Community_and_IACP.doc (letter dated September 2006). Hoffman is the founding chair of the CP Committee of the ABA Section of Dispute Resolution.

²³⁴ For an analysis explaining why parties have not used CL in business cases, see David A. Hoffman, *Collaborative Law in the World of Business*, COLLABORATIVE REV., Winter 2003, at 1, *available at* <http://www.bostonlawcollaborative.com/documents/2005-09-CL-World-Business.pdf>.

²³⁵ William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 375–77 (2004).

²³⁶ *Id.* at 373.

that clients said they chose CP were concerns about the impact of divorce on the children and the co-parenting relationship with their spouse.²³⁷ When lawyers were asked how significant the disqualification provision was to influence their clients to remain in negotiations, 35% said it was “very significant,” 43% said it was “somewhat significant,” and 22% said it was “not at all significant.”²³⁸ Of clients who settled in CP, 54.5% said the disqualification provision had not kept them in negotiations when they would have otherwise gone to court, and 45.5% said that it had kept them in negotiations.²³⁹ The clients generally reported being satisfied with the outcome of their divorce, with an average rating of 4.35 on a 5-point scale.²⁴⁰

Professor Julie Macfarlane conducted an in-depth, three-year study of CP in the U.S. and Canada based on interviews with CP practitioners and clients.²⁴¹ She found that they generally used interest-based negotiation and when they engaged in adversarial negotiation, they usually had more information and a more constructive spirit than in traditional negotiations.²⁴² In general, agreements reached in a CP process contained provisions comparable to those reached through traditional negotiation, though CP parties sometimes developed creative provisions tailored to their interests. Macfarlane found no evidence that weaker parties in CP received less favorable terms than they probably would have in traditional negotiation.²⁴³ In general, CP parties benefited from improved communication and were satisfied with the process and their lawyers.²⁴⁴ CP lawyers were generally quite pleased with the process, which enabled them to practice more consistently with their values and provide better service to clients.²⁴⁵

Macfarlane’s research also raised some concerns about CP. She found that there were sometimes “mismatches” in expectations and values between CP lawyers and clients.²⁴⁶ For example, “[c]lients generally took a far more pragmatic approach to their use of [CP] than their lawyers did. Lawyers were more likely to describe loftier goals that, for some, bordered on an

²³⁷ *Id.* at 378.

²³⁸ *Id.* at 379.

²³⁹ *Id.*

²⁴⁰ *Id.* at 380.

²⁴¹ JULIE MACFARLANE, *THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES* (2005), available at http://canada.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf.

²⁴² *Id.* at 30–32.

²⁴³ *Id.* at 57.

²⁴⁴ *See id.* at 78.

²⁴⁵ *Id.* at 17–21.

²⁴⁶ *Id.* at 26–27.

ideological commitment.”²⁴⁷ She also found that CP “is being widely marketed as faster and less expensive than litigation” and that “sometimes, clients who signed on for [CP] largely because of the ‘promises’ of speedy and inexpensive dispute resolution are bitterly disappointed with their final bill and disillusioned by how long it has taken for them to reach a resolution.”²⁴⁸ CP lawyers in her study also varied in whether they screened cases for appropriateness, as some experienced practitioners did screen cases but others were “so keen to get their first experience of [CP] that they make no such evaluation.”²⁴⁹ She also found general problems in CP lawyers’ process of obtaining clients’ informed consent, as the lawyers often explained the process using “abstract definitions that may not be meaningful to clients.”²⁵⁰ Although some CP lawyers have had difficulty with these issues, this is not surprising in the early phases of an innovative practice and there are ways for Collaborative lawyers to manage them effectively.²⁵¹

E. Cooperative Practice

Cooperative Practice is a recent innovation developed by lawyers who wanted to use a negotiation process similar to Collaborative Practice but also wanted to make some modifications. The key distinction is that unlike Collaborative Practice, Cooperative Practice does not include a disqualification agreement.²⁵² In addition, Cooperative process may not involve all the procedures expected under Collaborative Practice norms. Instead, Cooperative process provides a useful alternative to a Collaborative process when parties (1) trust the other side to some extent but are uncertain about their intent to cooperate, (2) fear that the other side might exploit the disqualification agreement to gain an advantage, (3) do not want to lose their lawyer’s services in litigation if needed, (4) cannot afford to pay new

²⁴⁷ MACFARLANE, *supra* note 241, at 25.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 65. According to CP experts and ethical rules and opinions, CP lawyers have a duty to assess whether cases are appropriate for CP and obtain clients’ informed consent to use the process. Factors relevant to appropriateness include the personal motivation and suitability of the parties, their trustworthiness, history of domestic violence, mental illness, or substance abuse, suitability of the lawyers, parties’ fear or intimidation, and risks of disqualification. Because of the additional cost of hiring litigation counsel after a “failed” CP negotiation, there are special concerns when parties cannot afford litigation counsel in that situation. *See Lande & Mosten, supra* note 229.

²⁵⁰ MACFARLANE, *supra* note 241, at 64.

²⁵¹ *See Lande & Mosten, supra* note 229.

²⁵² *See Lande, supra* note 6, at 260.

litigation counsel in event of an impasse, (5) want to have selective access to the legal system without necessarily terminating a cooperative negotiation process, or (6) want to tailor the process in ways that differ from the norms in a local Collaborative community.²⁵³

Lawyers started using Cooperative Practice in the middle of this decade, more than a decade after Collaborative Practice was first developed, and there are now only a few organized Cooperative Practice efforts. In 2003, lawyers in Wisconsin formed an organization called the Divorce Cooperation Institute (DCI) to offer a Cooperative process.²⁵⁴ Members of the Boston Law Collaborative (BLC) have been using "Cooperative Negotiation Processes" since 2005.²⁵⁵ In that same year, the Mid-Missouri Collaborative and Cooperative Law Association was organized to offer Cooperative as well as Collaborative Law processes.²⁵⁶ Also around 2005, the Garvey Schubert Barer law firm started developing a form of Cooperative Practice they call "Win²" (Win Squared) which they use in employment cases.²⁵⁷ Although a Cooperative process is often used in family cases, the lack of a disqualification agreement makes it especially attractive in non-family cases, as the Garvey experience indicates.²⁵⁸

BLC founder David Hoffman, who does both Collaborative and Cooperative Practice, uses a "cooperative negotiation agreement," which is "virtually identical" to his Collaborative participation agreement except that it omits the disqualification provision and includes a mandatory mediation clause and a sixty-day cooling-off period before parties may file papers in court.²⁵⁹ This Cooperative process, similar to that in Collaborative cases,

²⁵³ *Id.* at 259–60.

²⁵⁴ Divorce Cooperation Institute, <http://cooperativedivorce.org/about/index.cfm> (last visited Feb. 23, 2009).

²⁵⁵ Boston Law Collaborative, <http://www.bostonlawcollaborative.com/blc/resources/forms-statutes-rules-and-articles/collaborative-law-forms.html> (last visited Feb. 23, 2009).

²⁵⁶ Mid-Missouri Collaborative & Cooperative Law Association, <http://www.mmcla.org/index.php> (last visited Feb. 23, 2009).

²⁵⁷ Garvey Schubert Barer, Win², <http://www.gsbaw.com/practice/area.asp?areaID=131&groupID=53> (last visited Feb. 23, 2009).

²⁵⁸ See *supra* text accompanying note 232 for discussion of parties' and lawyers' reluctance to use Collaborative Practice in non-family cases because of the disqualification agreement.

²⁵⁹ David A. Hoffman, *Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, in *INNOVATIONS IN FAMILY LAW* 67-68 (Kelly Browe Olson & Nancy ver Steegh eds., 2008). The participation agreement

involves meetings between counsel, four-way meetings as the primary locus of negotiation, review and execution of a participation agreement, use of explicit agendas, engagement of joint experts, and follow-up conversations between counsel.²⁶⁰ Hoffman stated that a Cooperative process is particularly appropriate in cases where it is not clear whether a Collaborative process or mediation is appropriate.²⁶¹ On the other hand, he cautioned that Cooperative negotiations might be less cooperative than in a Collaborative process because everyone knows that the lawyers might go to court in that case.²⁶² Hoffman described one Collaborative case where highly antagonistic parties would have been better off in a Cooperative process because there would have been less direct interaction between them.²⁶³ He described another case that would have been quite appropriate for a Collaborative process but the parties wanted a Cooperative process because they were very pleased with their lawyers, had limited funds, and feared having to hire new lawyers if they failed to reach agreement.²⁶⁴

John Lande conducted a study of DCI using interviews and surveys and found that DCI lawyers' principal goals were to offer an efficient process tailored to the parties' needs based on valid information, direct negotiation, and decisionmaking by clients.²⁶⁵ "They wanted to minimize use of the courts—and also have access to them if needed to promote constructive resolutions."²⁶⁶ Many were concerned that parties in Collaborative cases risked feeling abandoned by their lawyers if they needed to litigate.²⁶⁷ Furthermore, the Collaborative process is not appropriate for parties who cannot afford to hire litigation attorneys if they do not reach an agreement in Collaborative Law.²⁶⁸

Lande found that DCI members have certain norms and practices for their Cooperative cases, which are less formal than the BLC Cooperative Negotiation model or Collaborative Practice generally. DCI has a general

includes an exception to the cooling-off period and mediation requirement if there are exigent circumstances. *Id.*

²⁶⁰ *Id.* at 72-75.

²⁶¹ *Id.* at 69-72.

²⁶² *Id.* at 70.

²⁶³ *See id.* at 80-81

²⁶⁴ *Id.* at 81-82.

²⁶⁵ Lande, *supra* note 6, at 227.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 220.

²⁶⁸ *Id.*

statement of principles²⁶⁹ that parties and lawyers agreed to in Cooperative cases,²⁷⁰ though most DCI lawyers generally did not use written participation agreements.²⁷¹ DCI members generally saw Cooperative procedures as more collaborative than litigation-oriented practice and more flexible than Collaborative practice. In general, DCI members tried to tailor the process to fit the needs of each case. They said that they used four-way meetings when they believed it would be appropriate, and tried to determine the number and length of the meetings based on the needs of the parties, believing that it is sometimes more efficient and appropriate to advance the process through conversations between lawyers outside the four-way meetings.²⁷² Their preference for flexibility was a response to perceptions that Collaborative Practice is done almost exclusively in four-way meetings, which were seen as sometimes unnecessary or too long.²⁷³ Many also believed that the Collaborative process often involves too many professionals such as coaches, financial experts, and child development experts, which unnecessarily increased the cost and time involved.²⁷⁴

DCI members said that they used litigation selectively when it seemed appropriate and most said that using litigation usually did not prevent parties from negotiating cooperatively.²⁷⁵ DCI members reported that Cooperative cases can go back and forth between negotiation and litigation and that sometimes parties needed to hear things from a judge, such as issuance of a temporary order (which one called “reality therapy”), and then get back to negotiating the permanent resolution.²⁷⁶ They said that the Cooperative process could also improve the quality of litigation by improving

²⁶⁹ Divorce Cooperation Institute, Principles of the Process, <http://cooperativedivorce.org/about/principles.cfm> (last visited Jan. 26, 2009). The principles involve commitments by the parties and attorneys to act civilly, respond promptly to all reasonable information requests, fully disclose all relevant financial information, obtain joint expert opinions before obtaining individual expert opinions, obtain meaningful expert input before requesting a custody study or appointment of a guardian ad litem, and cooperate in good faith negotiation sessions to reach fair compromises based on valid information. *Id.*

²⁷⁰ Lande, *supra* note 6, at 231–32.

²⁷¹ *Id.*

²⁷² *Id.* at 240.

²⁷³ *Id.* at 226.

²⁷⁴ *Id.* at 222–27.

²⁷⁵ *Id.* at 242.

²⁷⁶ Lande, *supra* note 6, at 242.

relationships and focusing the contested issues.²⁷⁷ DCI members believed that in Cooperative cases, parties generally were more involved, cooperative, and more satisfied with the process than in litigation-oriented cases and that the parties' interests generally were better satisfied in Cooperative cases, with less time and cost required.²⁷⁸

The Garvey Schubert Barer law firm's Win² process involves an early exchange of key information and a structured negotiation process with certain "rules and commitments designed to minimize traditional settlement 'game-playing.'"²⁷⁹ The Garvey firm, which generally represents defendants, developed Win² by consulting with plaintiffs' attorneys so that they have confidence in the process.²⁸⁰ Win² offers parties the opportunity to understand and evaluate the case before much time or money is invested.²⁸¹ Garvey's brochure states that Win² encourages creative outcomes that employees often really want, such as apologies, institutional reforms, and feeling truly heard and respected, and the process provides employers the chance to learn about ways that they could improve their practices and avoid similar problems in the future.²⁸² The firm reported that 39 of the first 40 Win² cases were settled.²⁸³ They calculated that these first 40 cases typically were completed in 1–3 months and that the attorneys' fees averaged \$16,760 per case compared with 3–9 months in traditional litigation and average attorneys fees of \$63,323.²⁸⁴ Presumably, some of the differences in costs and expenses are due to the differences in the parties' motivations and other circumstances of the cases, but this does suggest that the process can be efficient in appropriate cases. Retired Judge Frank Evans describes a similar innovation, called "ADR Management," where neutral ADR managers help parties and lawyers plan and manage a process, which may involve a variety

²⁷⁷ *Id.* Professors Michael Moffitt and Elizabeth Thornburg describe how lawyers can negotiate to tailor trial procedures to fit their needs. *See generally* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181. These approaches would be particularly suitable for Cooperative lawyers when they need to adjudicate.

²⁷⁸ *See* Lande, *supra* note 6, at 249–55.

²⁷⁹ Garvey Schubert Barer, *supra* note 257.

²⁸⁰ *See* Garvey Schubert Barer, Win²: A Win-Win Alternative to Traditional Litigation 4, http://www.gsblaw.com/pdfs/GSB-Win2_Brochure.pdf (last visited Feb. 23, 2009).

²⁸¹ *Id.* at 3.

²⁸² *Id.*

²⁸³ *Id.* at 7.

²⁸⁴ *Id.*

of procedural elements including use of joint experts, negotiation, and/or mediation.²⁸⁵

Cooperative Practice is a relatively new process that has not been widely used. To date, it has largely been used by small groups of lawyers who build on existing relationships, which is probably one reason that DCI lawyers are comfortable operating without written participation agreements. There is not a single clear model, which can be both a strength and a weakness. This permits flexibility to tailor negotiation processes to parties' needs relatively efficiently, especially between lawyers who already trust each other. The lack of clear definition can also result in some uncertainty about what is involved and may inhibit some lawyers from recognizing it as an option and suggesting that clients consider it.

IV. CONCLUSION

This survey of processes promoting early case handling reflects motivations to improve the disputing process in many different contexts and with various methods. Courts and professionals offering these processes seek to make disputing less nasty, brutish, and long. Framing the motivation affirmatively, they all work to create processes enabling parties to intentionally and, if possible, cooperatively manage their disputes from the outset. Partly, this is to make the process more efficient. Partly, it is to improve the quality of the process so that people feel more in control (i.e., less subject to the decisions of adverse parties or courts) and able to design solutions that satisfy the parties' interests as well as possible.

Courts seek to promote early case handling to address the needs of litigants as well as the courts' own operational needs in using their limited resources to handle a continuous stream of cases. Courts have been self-consciously managing cases for decades²⁸⁶ and, as this article indicates, have become increasingly engaged in this process. Parties often have somewhat passively relied on the litigation process and the courts to move cases along. This article describes several methods that they have increasingly used in recent years to take the initiative to manage their cases early in disputes, without court involvement. Although these methods are not appropriate in all cases and parties will not always achieve the desired results with them, they are generally quite positive developments.

²⁸⁵ Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10, 16–20.

²⁸⁶ See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

In planning such processes, dispute system designers should recognize that a non-trivial proportion of people ignore authoritative directives to use ECH processes. For example, some lawyers ignore orders to “confer and report,”²⁸⁷ some courts ignore statutes requiring them to develop differentiated case management systems,²⁸⁸ and some executives ignore corporate pledges to consider using ADR.²⁸⁹ In Wissler and Dauber’s article, *Leading Horses to Water: The Impact of an ADR “Confer and Report” Rule*,²⁹⁰ they argued that “if a court expects lawyers to discuss their cases and resolve them sooner, more steps than simply mandating early discussions may be needed to get these ‘horses’ to ‘drink.’”²⁹¹ Indeed, mere mandates may be insufficient to get some “horses” even to go to the “water,” let alone drink it. In other words, unless rules are strenuously enforced, they are probably insufficient to make some people try disputing processes at all and even less effective in forcing some to do so conscientiously.²⁹² Thus, although rules and orders may be helpful or necessary to promote early case handling, they are likely to be ineffective unless they become part of a broader and well-designed ECH system.²⁹³

It is also important to remember that these ECH processes are not uniform and will not invariably produce the same results in different settings. Much depends on the particular procedures used and the motivations and abilities of the people involved. Professor Craig McEwen noted that the RAND study of the Federal Civil Justice Reform Act found that the amount of time and cost was not “significantly affected by mediation or neutral evaluation in any of the six programs studied,” which prompted a heated controversy about whether the study validly showed that mediation “didn’t work.”²⁹⁴ Professor McEwen argued that this debate focused on the wrong question:

²⁸⁷ See *supra* text accompanying note 55.

²⁸⁸ See *supra* notes 56–59 and accompanying text.

²⁸⁹ See *supra* note 157–60 and accompanying text

²⁹⁰ See Wissler & Dauber, *supra* note 11.

²⁹¹ *Id.* at 272.

²⁹² In one study, when a court devoted substantial resources to enforcing a requirement that lawyers confer and file a joint statement, there was a sizeable increase in compliance, however, lawyers still did not comply in 38% of the cases. Wissler & Dauber, *supra* note 11, at 254, 257.

²⁹³ For recommendations to develop ADR policy relying primarily on non-regulatory strategies and use of regulation only as a last resort, see generally Lande, *Principles for Policymaking about Collaborative Law*, *supra* note 219, at 640–55.

²⁹⁴ McEwen, *supra* note 7, at 1–2 (quoting KAKALIK ET AL., *supra* note 51, at xxvii).

Instead of asking whether mediation works or not, we need to examine how and why parties and lawyers “work” mediation in varying ways. Asking the second question rather than the first would refocus the conclusions from the Rand research. What if the press release summarizing that study had said, “Lawyers and parties in federal courts fail to make effective use of mediation and early neutral evaluation to speed resolution and reduce costs”?²⁹⁵

By the same token, noting the favorable evaluation of differentiated case management in the Federal Judicial Center study and the relatively unfavorable evaluation in the RAND study,²⁹⁶ it makes no sense to try to conclude whether “it” generally “works.” One can reasonably conclude that “it works” under favorable circumstances (particularly the supportive motivations of the responsible individuals) and that it “does not work” under unfavorable circumstances. Thus policymakers, analysts, and practitioners should be very cautious in interpreting empirical research, including findings presented in this article. Rather than generalizing from favorable findings that a particular process “does work,” the more appropriate interpretation is that the process “can work” under certain circumstances but not necessarily all circumstances. Conversely, findings that a process had no effect on certain outcomes should be interpreted to mean that the process did not work under the particular circumstances studied but might work under other circumstances.²⁹⁷

It is also important to recognize that “the process” almost certainly has many variations and the results of any single study may not generalize to variations of the process that were not studied. Caution is necessary unless there are multiple well-designed studies of different variations of a process that produce similar results (i.e. where the findings are considered “robust”). Thus general social science research on disputing processes would be particularly helpful if it focuses on particular design features of the processes and factors relating to the way people use them.²⁹⁸ Given the challenges in conducting generalizable research on disputing processes and the limited resources available for such research, policymakers, and dispute system

²⁹⁵ *Id.* at 3.

²⁹⁶ See *supra* notes 79–83 and accompanying text.

²⁹⁷ See generally Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103 (1997) (analyzing major challenges in conducting and using empirical research on civil disputing).

²⁹⁸ See generally John Lande, *Focusing on Program Design Issues in Future Research on Court-Connected Mediation*, 22 CONFLICT RESOL. Q. 89 (2004) (recommending that future empirical research focus on mediation program design choices rather than establishing the general efficacy of mediation).

designers should not rely too much on general studies of these processes. Instead, when appropriate, they should consider conducting basic inquiries of their own as part of a dispute system design process. Such research can be tailored to the particular circumstances of the system and can focus on plausible system design options.²⁹⁹

Dispute system design theory, practice, and research should incorporate the “earliness” of conflict management as an explicit and important element. Part of the system design process involves engaging stakeholders in the process (including research design), which can help identify circumstances when parties and professionals would be most motivated to successfully use an ECH process. ECH innovators should work to develop effective demonstration models and identify the factors that are critical to their success. The awareness that potential users have of such innovations and their motivation to use them will almost always be among the essential factors.³⁰⁰

Of course, no process can eliminate the unpleasantness of disputing in all cases. However, greater use of well-designed ECH systems can help many parties navigate the process more efficiently and produce a greater sense of control and better outcomes. A movement toward greater use of ECH processes in private dispute resolution is particularly desirable to help parties assume greater responsibility for managing their disputes and also to relieve courts of these responsibilities when appropriate.

²⁹⁹ See, e.g., John Lande, *Improving Mediation Quality: You, Too, Can Do This in Your Area*, 26 ALTERNATIVES TO HIGH COST LITIG. 89 (2008) (summarizing recommendations for local quality improvement initiatives by Task Force on Improving Mediation Quality of the ABA Section of Dispute Resolution). Conducting and interpreting even simple research can be challenging, so expert advice and some humility would be appropriate.

³⁰⁰ There are many good manuals and analyses providing helpful advice for dispute system designers in courts and private dispute resolution systems. See, e.g., COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 29, at 1–25 (Judicial Conference of the United States manual with suggestions for early case handling); Conbere, *supra* note 16, at 217–25, 228–30 (analyzing six versions of dispute system design theory); Cronin-Harris, *supra* note 141 (cataloging numerous strategies of “mainstreaming” ADR in business); SMITH, *supra* note 165, at 40–41 (offering recommendations for large businesses to improve their dispute resolution systems); McEwen, *supra* note 7, at 14–27 (recommending ways to overcome barriers to effective management of disputing); NIEMIC ET AL., *supra* note 88 (Federal Judicial Center guide for judicial management of cases in ADR); STEELMAN, *supra* note 27 (National Center for State Courts’ guide for caseload management).

